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IN
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TABLE OF CASES REPORTED.

	Page.		Page.
Acme Cement and Plaster Co....	125	Clarkson, John W.....	399
Altenberg <i>v.</i> Fogarty.....	112	Cleveland <i>et al.</i> <i>v.</i> Eureka No. 1	
Andrew <i>v.</i> Stuart.....	264	Gold Mining and Milling Co..	69
Ashton, Fred W.....	356	Cobb, Charles H.....	220
Bakersfield Fuel and Oil Co. <i>v.</i>		Coffin, Edgar A.....	430
Saalburg.....	312	Coffin, Mary E.....	175, 252
Baldey, George.....	344	Cole, Abraham.....	311
Beal, Mattie H.....	366	Collins <i>v.</i> Hoyt.....	343
Bickford <i>v.</i> McCloskey.....	166	Cook, George W.....	428
Biggs <i>et al.</i> , Northern Pacific Ry.		Couts <i>v.</i> Strickler <i>et al.</i>	446
Co. <i>v.</i>	254	Cox, Allen H. (on re-review) ..	114, 193
Bond <i>et al.</i> <i>v.</i> State of California.	34	Crystal River R. R. Co., Rio	
Boswell, Arthur Y.....	144	Grande R. R. Co. <i>v.</i>	411
Boyce, Robert F.....	162	Deary, William.....	19
Bradford, J. L.....	132	Dool, Anna I.....	184
Bradford, King <i>et al.</i> <i>v.</i>	108, 111	Eastern Oregon Land Co.....	174
Brandt, William W.....	277	E. F. C. Mining and Milling Co.,	
Brayton, Homer E.....	364, 443	Wanda Gold Mining Co. <i>v.</i>	140
Breeding, William.....	80	Eureka No. 1 Gold Mining and	
Bridge, Henry S.....	270	Milling Co., Cleveland <i>et al.</i> <i>v.</i>	69
Brown, Benjamin F., <i>v.</i> Northern		Fogarty, Altenberg <i>v.</i>	112
Pacific Ry. Co.....	161	Forbes, Hutton <i>et al.</i> <i>v.</i>	325, 352, 442
Brown, Ulfers, <i>v.</i> Northern Pacific		Fort Hall Reservation.....	146
Ry. Co.....	29	Fox <i>v.</i> Mutual Mining and Mill-	
Buena Vista Rancho.....	446	ing Co.....	59
Burns, Southern Pacific R. R.		Fry <i>v.</i> Kuper.....	159
Co. <i>v.</i>	272	Gerard, Edward, trustee.....	323
California and Oregon Land Co.	215	Golden and Cord Lode Mining	
California, State of.....	335	Claims.....	178
California, State of, Bond <i>et al.</i> <i>v.</i>	34	Goldstein, Harkrader <i>et al.</i> <i>v.</i> ...	87
Calvert <i>v.</i> Wood.....	83	Goodhue, Strader <i>v.</i>	137
Chapman, Murray <i>v.</i>	169, 427	Gray Eagle Oil Co. <i>v.</i> Clarke (on	
Chicago and Northern R. R. Co.		review).....	303
<i>v.</i> Harvey.....	246	Hamilton, Leslie M.....	165
Chippewa Lands.....	72, 106	Hannon <i>et al.</i> , Howell <i>v.</i>	433
Choctaw, Oklahoma and Gulf		Harding, Julian <i>v.</i>	10
R. R. Co.....	192	Harkrader <i>et al.</i> <i>v.</i> Goldstein ...	87
Clarke, Gray Eagle Oil Co. <i>v.</i> (on		Harvey, Chicago and Northwest-	
review).....	303	ern R. R. Co. <i>v.</i>	246
Clarke, Kern Oil Co. <i>et al.</i> <i>v.</i> (on			
review).....	288		

	Page.		Page.
Hawaiian Lands	238, 249, 281	Mountain Power Co. v. Newman	360
Highland Marie and Manilla		Murray v. Chapman	169, 427
Lode Mining Claims	37	Mutual Mining and Milling Co.,	
Hochwart v. Maresh	276	Fox v.	59
Honeycutt, Samuel F.	25		
Howell, John H.	105, 216	Navajo Indian Reservation	381
Howell v. Hannon <i>et al.</i>	433	Newman, Mountain Power Co. v.	360
Hoyt, Collins v.	343	New Mexico, Land Company of,	
Hutton <i>et al.</i> v. Forbes	325, 352, 442	Limited, <i>et al.</i>	202
Hyde, F. A.	28	New Mexico, Territory of ..	188, 261, 389
		Northern Pacific Ry. Co.	32, 198, 394, 432
Jacoby v. Kubal	382, 428	Northern Pacific Ry. Co., Brown,	
Johnson, Westervelt v.	67	Benjamin F., v.	161
Julian v. Harding	10	Northern Pacific Ry. Co., Brown,	
		Ulfers, v.	29
Keeler, Julia B.	354	Northern Pacific Ry. Co., Meyer v.	196
Kern Oil Co. <i>et al.</i> v. Clarke (on		Northern Pacific Ry. Co., Miller v.	129
review)	288	Northern Pacific Ry. Co., State	
Ketchum, David F.	49	of Washington v.	386
King <i>et al.</i> v. Bradford	108, 111	Northern Pacific Ry. Co. v. Biggs	
Kiowa, Comanche, Apache, and		<i>et al.</i>	254
Wichita lands	1, 9,	Northern Pacific Ry. Co. v. Pyle	396
46, 62, 63, 67, 107, 125, 154,	439, 445	Northern Pacific Ry. Co. v. Smith	
Kubal, Jacoby v.	382, 428	<i>et al.</i>	151, 202
Kuper, Fry v.	159		
		O'Donnell, Frank J.	101
Land Company of New Mexico,		Oklahoma, Territory of	269
Limited, <i>et al.</i>	202	Oregon, State of	149
Landrum, Porter v.	352	O'Rourke, Walsh and	77
Laughlin, Allen	256, 288		
Leaming v. McKenna	318	Pasadena and Mt. Wilson Toll	
Lellie Lode Mining Claim	21	Road Co. <i>et al.</i> v. Schneider ...	405
Los Luceros Grant	202	Paul Jones Lode	359
Lyons and Campbell Ranch and		Peavey, Gary B.	186
Cattle Co. v. Stockton	341	Piru Oil Company <i>et al.</i> , Hutton	
		<i>et al.</i> v.	325, 352, 442
Maginnis, Charles P.	222	Porter v. Landrum	352
Mallory, Henry C.	213	Proclamation (Kiowa, etc., lands)	1
Manners Construction Co. v.		Purtle v. Steffee	400, 403
Rees	408	Pyle, Northern Pacific Ry. Co. v.	396
Maresh, Hochwart v.	276		
Mary Darling Placer Claim	64	Rancho Buena Vista	446
McCaslin, Webb	243	Rees, Manners Construction	
McCloskey, Bickford v.	166	Co. v.	408
McKenna, Leaming v.	318	Republic and Kettle River Ry.	
McReynolds, Frederick W.	259	Co. v. Washington and Great	
Meyer v. Northern Pacific Ry.		Northern Ry. Co.	119
Co.	196	Rio Grande R. R. Co. v. Crystal	
Miller v. Northern Pacific Ry. Co.	129	River R. R. Co.	411
Mono Fraction Lode Mining		Roman Catholic Church of San	
Claim	121	Xavier Del Bac	323
Moses, William E.	320	Romance Lode Mining Claim ..	51

TABLE OF CASES REPORTED.

IX

	Page.		Page.
Saalburg, Bakersfield Fuel and Oil Co. <i>v.</i>	312	Steffee, Purtle <i>v.</i>	400, 403
St. Louis, Oklahoma and Southern Ry. Co.	124	Stockton, Lyons and Campbell Ranch and Cattle Co. <i>v.</i>	341
San Xavier Del Bac Roman Catholic Church.	323	Strader <i>v.</i> Goodhue.	137
Schneider, Pasadena and Mt. Wilson Toll Road Co. <i>et al. v.</i> ..	405	Strickler <i>et al.</i> , Coutts <i>v.</i>	446
Sexton <i>et al.</i> , Southern Cross Gold Mining Co. <i>v.</i>	415	Stuart, Andrew <i>v.</i>	264
Shawnee, Oklahoma and Missouri Coal and Ry. Co.	39	Territory of New Mexico ..	188, 261, 389
Shoshone and Bannock Indians.	146	Territory of Oklahoma.	269
Shute, Royal B.	26	Umatilla Indian Reservation ...	392
Sierra Lumber Co.	143, 349	Underwood, John M., <i>et al.</i>	258
Smith, Arden L.	184	Union Pacific Ry. Co.	442
Smith <i>et al.</i> , Northern Pacific Ry. Co. <i>v.</i>	151, 202	Ute Indian Reservation	388
Smith, Joshua L.	57, 124	Walsh and O'Rourke	77
Southern Cross Gold Mining Co. <i>v.</i> Sexton <i>et al.</i>	415	Wanda Gold Mining Co. <i>v.</i> E. F. C. Mining and Milling Co.	140
Southern Pacific R. R. Co. <i>v.</i> Bruns	272	Washington and Great Northern Ry. Co., Republic and Kettle River Ry. Co. <i>v.</i>	119
Spain, John W.	362	Washington, State of, <i>v.</i> Northern Pacific Ry. Co.	386
State of California.	335	Westervelt <i>v.</i> Johnson	67
State of California, Bond <i>et al. v.</i> ..	34	Wink, Arnold.	47, 146
State of Oregon.	149	Wood, Calvert <i>v.</i>	83
State of Washington <i>v.</i> Northern Pacific Ry. Co.	386	Wullich, John	403
		Wynne, Maggie	122

OPINIONS BY THE ASSISTANT ATTORNEY-GENERAL.

	Page.		Page.
July 19, 1901.—Right of way; Indian lands; act of March 2, 1899	39	February 18, 1902.—Hawaiian lands; exchange; section 55, act of April 30, 1900	249
October 28, 1901.—Indian allotment; act of June 6, 1900; Acme Cement and Plaster Co.	125	April 4, 1902.—Hawaiian lands; right of way; easement	281
December 4, 1901.—Indian allotments; Fort Hall Reservation; act of June 6, 1900.	146	April 25, 1902.—White Earth Indian Reservation; sale of timber; act of June 7, 1897.	315
January 8, 1902.—Indian lands; railroad right of way; section 5, act of February 18, 1888 ...	192	June 28, 1902.—Indian homestead; allotment; section 4, act of February 8, 1887	417
February 7, 1902.—Hawaiian lands; exchange.	238	November 15, 1902.—Indian lands; allotments; ejectment of intruders	439

TABLE OF CASES CITED.

[The abbreviation "L. D." refers to this publication; "L. and R." to the records in the division of Lands and Railroads; "B. L. P.," to Brainerd's Legal Precedents; "1. C. L. L.," to Copp's Public Land Laws, Ed. 1875; "2. C. L. L.," to Copp's Public Land Laws, Ed. 1882; "C. L. O.," to Copp's Land Owner; "C. M. D.," to Copp's Mining Decisions; "C. M. L.," to Copp's Mineral Lands; "Lester," to Lester's Land Laws and Decisions; "Rep.," to the Reporter; "S. M. D.," to Sickles's Mining Laws and Decisions; and "C. Cls.," to the Court of Claims.]

	Page.		Page.
Abbott v. Willard; 13 L. D., 459	139	Cain <i>et al.</i> v. Addenda Mining Co.; 29 L. D., 62	71
Adair, Joseph M.; 8 L. D., 200	357	California, State of; 14 L. D., 253	306
Alice Lode Mining Claim; 30 L. D., 481 ..	360	California, State of; 15 L. D., 10	337, 341
Allen, William F.; 29 L. D., 660	123	California, State of; 23 L. D., 230	306
American Investment Co.; 5 L. D., 603 ..	56	California, State of; 23 L. D., 423	338
Angell, John C.; 24 L. D., 575	123	California, State of, v. Martin; 5 L. D., 99.	306
Ansecomb, Alfred; 26 L. D., 337	138	California, State of, v. Moccettini; 19 L. D., 359	341
Aspen Consolidated Mining Co. v. Williams; 27 L. D., 1	92, 213	California, State of, v. Southern Pacific R. R. Co.; 27 L. D., 542	272
Aspen Mountain Tunnel Lode No. 1; 26 L. D., 81	142	Calvert v. Wood; 31 L. D., 83	145
Astiazaran v. Santa Rita Land and Mining Co.; 14 th U. S., 80	206	Cameron, John; 7 L. D., 436	279
Atherton v. Fowler; 96 U. S., 513	293	Cappelli v. Walsh; 12 L. D., 334	370
Avery's Administrator v. Avery's Heirs; 47 Ala., 509	346	Carter v. Ruddy; 166 U. S., 493	348
Baca Float No. 3; 29 L. D., 44	297	Chambers v. Harrington; 111 U. S., 350 ..	181
Barbour v. Wilson <i>et al.</i> ; 28 L. D., 61	271	Chesser v. O'Neil; 30 L. D., 294	172
Barden v. Northern Pacific R. R. Co.; 154 U. S., 288	212	Chicago, St. Paul, Minneapolis and Omaha Ry. Co.; 6 L. D., 195	340
Bardon v. Northern Pacific R. R. Co.; 145 U. S., 535	33, 433	Chormicle v. Hiller; 26 L. D., 9	265
Barker v. Harvey; 181 U. S., 481	34, 433	Christner v. Metz; 29 L. D., 693	277
Barklage <i>et al.</i> v. Russell; 29 L. D., 401 ..	71	Clayburg, Andrew; 20 L. D., 111	12, 277
Beck v. Flournoy Live Stock, etc., Co.; 65 Fed. Rep., 30	440	Cobb, Charles H.; 31 L. D., 220	353
Beley v. Napthaly; 169 U. S., 353	91	Cochems, Nicholas; 11 L. D., 629	256
Bergen, Lizzie; 30 L. D., 258	343	Coffin, Mary E.; 31 L. D., 175	253
Bishop, Francis M.; 5 L. D., 429	355	Colorado Coal and Iron Co. v. United States; 123 U. S., 307	94
Bishop of Nesqually v. Gibbon; 158 U. S., 155	158, 299, 306, 348	Commonwealth v. Wilkinson; 16 Pick., Mass., 175; 26 Am. Dec., 654	407
Book v. Justice Mining Co.; 58 Fed. Rep., 108	38	Conley, William H.; 30 L. D., 255	123
Brakken v. Dunn <i>et al.</i> ; 9 L. D., 461	139	Copper Glance Lode; 29 L. D., 542	38
Breannan v. Ferrell; 25 L. D., 266	245	Cornelius v. Kessel; 128 U. S., 456	334
Brown v. Hitchcock; 173 U. S., 473	91, 367	Cosmos Exploration Co. v. Gray Eagle Oil Co.; 112 Fed. Rep., 4	299
Brown v. United States; 1 Wool. U. S., 198.	138	Crowder, T. P.; 30 L. D., 92	31
Brundy v. Mayfield <i>et al.</i> ; 38 Pac. Rep., 1087	180	Davis, Henry L.; 12 L. D., 632	279
Bryant <i>et al.</i> v. Gill <i>et al.</i> ; 29 L. D., 68 ..	343	Davis, Jeff C.; 26 L. D., 342	171
Bulman v. Meagher; 13 L. D., 94	369	Deary, William; 31 L. D., 19	351, 352
Buncombe Turnpike Co. v. Baxter; 10 Ired., N. C., 222	407	Deffebach v. Hawke; 115 U. S., 392	94, 334
Burns, J. B.; 7 L. D., 20	226	Delorme v. Cordeau; 29 L. D., 277	418
		Dennis, Clarence, <i>et al.</i> ; 25 L. D., 370 ..	75
		Denver and Rio Grande R. R. Co. v. Clack; 29 L. D., 478	408
		Doherty v. Morris; 28 Pac. Rep., 85	38

	Page.		Page.
Dotson, Richard; 13 L. D., 275.....	226	Kern Oil Co. <i>et al.</i> v. Clotfelter; 30 L. D., 588.....	94, 315
Dover v. Richards; 151 U. S., 658.....	95	King v. Kemp; 29 Ala., 542.....	346
Doyle v. Wilson; 2 L. D., 28.....	258	Knaggs, Annie; 9 L. D., 49.....	279
Dunlap v. Shingle Springs and Placerville R. R. Co.; 23 L. D., 67.....	408	Knight, Albert B., <i>et al.</i> ; 30 L. D., 227.....	66
Dunluce Placer Mine; 6 L. D., 761.....	109	Knight v. United States Land Association; 142 U. S., 161.....	91, 158, 299, 302, 306, 348
Duran de Chavez Grant v. Saabedra; 23 L. D., 193.....	334	Labrie <i>et al.</i> v. Conger; 18 L. D., 555.....	55
Eells <i>et al.</i> v. Ross; 64 Fed. Rep., 417.....	440	Lapeyre v. United States; 17 Wall., 191.....	253
Elda Mining and Milling Co.; 29 L. D., 279.....	93	Laughrin, Frank; 29 L. D., 147.....	246
Ferry, Charles C.; 14 L. D., 126.....	55	Lawrence, Frederick W.; 23 L. D., 450.....	280
Fette v. Christiansen; 29 L. D., 710.....	404	Lockhart v. Rollins; 21 Pac. Rep., 413.....	38
Fleming v. Bower; 13 L. D., 78.....	54	Longnecker, J. M.; 30 L. D., 611.....	101
Florida, State of; 30 L. D., 187.....	339	Magruder v. Oregon and California R. R. Co.; 23 L. D., 174.....	93, 213
Frasher v. O'Connor; 115 U. S., 102.....	307	Malone, John; 17 L. D., 362.....	370
Gallihier v. Cadwell; 145 U. S., 368.....	435	Mann v. Tacoma Land Co.; 153 U. S., 273.....	433
Gardiner, Robert J.; 19 L. D., 83.....	279	Mason v. Cromwell; 26 L. D., 369.....	67
Gibbon v. Smith; 18 L. D., 249.....	266	Mattson v. St. Paul, Minneapolis and Manitoba Ry. Co.; 5 L. D., 356.....	152
Goldstein v. Juneau Townsite; 23 L. D., 417.....	89, 101	Maxwell Land Grant; 121 U. S., 325.....	206
Gosney, E. S.; 30 L. D., 44.....	49	McCreery v. Everding; 44 Cal., 246.....	450
Gourley v. Countryman; 27 L. D., 702; 28 L. D., 198.....	168	McDonald, Gideon F.; 30 L. D., 124.....	253
Graham v. Hastings and Dakota Ry. Co.; 1 L. D., 362.....	171	McIntosh, Daniel R.; 8 L. D., 641.....	55
Gray Eagle Oil Co. v. Clarke; 30 L. D., 570.....	188,	Melvin <i>et al.</i> v. California; 6 L. D., 702.....	439
	221, 222, 315, 353	Michie v. Gothberg; 30 L. D., 407.....	403
Griffin v. Marsh; 2 L. D., 28.....	258	Michigan Land and Lumber Co. v. Rust; 168 U. S., 589.....	91
Grisar v. McDowell; 6 Wall., 363.....	320	Miller, Charles W.; 6 L. D., 339.....	226
Haggin, J. B.; 7 L. D., 287.....	429	Minnesota, State of; 22 L. D., 388.....	101
Hall v. Chapman; 35 Ala., 558.....	346	Minnesota, State of, v. Hitchcock; 185 U. S., 373.....	433
Hall v. Wade; 6 L. D., 788.....	171	Montana Ore-Purchasing Co. v. Boston and Montana Consolidated Copper and Silver Mining Co.; 51 Pac. Rep., 159.....	25
Hamilton, Leslie M.; 31 L. D., 165.....	428	Mormon Church v. United States; 136 U. S., 1.....	249
Hampton, James; 15 L. D., 449.....	226	Morton v. Nebraska; 21 Wall., 660.....	390
Hardee, D. C.; 7 L. D., 1.....	347	Myers v. Croft; 13 Wall., 291.....	168
Harrigan, W. D.; 29 L. D., 153.....	246, 247	Newhall v. Sanger; 92 U. S., 761.....	187
Harris v. Radcliffe; 2 L. D., 147.....	172	New Mexico, Territory of; 29 L. D., 364.....	191
Hastings and Dakota R. R. Co. v. Whitney; 132 U. S., 357.....	443	North Central R. R. Co. v. Commonwealth; 90 Pa. St., 300.....	407
Hatcher v. Clifton; 33 Ala., 301.....	346	Northern Pacific R. R. Co. v. De Lacey; 174 U. S., 622.....	34, 255
Hawley v. Diller; 178 U. S., 476.....	92, 308	Northern Pacific R. R. Co. v. Musser-Sauntry Co.; 168 U. S., 604.....	34, 433
Heath v. Hallinan; 29 L. D., 267.....	130	Northern Pacific R. R. Co. v. Parker <i>et al.</i> ; 2 L. D., 569.....	152
Hegler v. Faulkner; 153 U. S., 109.....	100	Oleson, Hans; 28 L. D., 25.....	195, 320
Hewitt v. Schultz; 180 U. S., 139.....	272	Orchard v. Alexander; 157 U. S., 372.....	302, 306
Heydenfeldt v. Daney Gold and Silver Mining Co.; 93 U. S., 634.....	128	Organ, Kate G.; 20 L. D., 406; 25 L. D., 231.....	279, 280
Hidee Gold Mining Co.; 30 L. D., 420.....	360	Owen v. Lutz; 14 L. D., 472.....	171
Holcomb, Jedediah F.; 22 L. D., 604.....	279	Pacific Coast Marble Co. v. Northern Pacific R. R. Co.; 25 L. D., 233.....	110
Holmes Placer; 26 L. D., 650.....	65	Parcher v. Gillen; 26 L. D., 34.....	92
Hornsby v. Carson, <i>et al.</i> ; 29 L. D., 171.....	139	Parker v. Castle; 4 L. D., 84.....	277
Hosmer v. Wallace; 97 U. S., 575.....	293	Parsons v. Venzke; 164 U. S., 89.....	302, 306
Howell, John H.; 24 L. D., 35.....	218	Patrick, Holmes C., <i>et al.</i> ; 14 L. D., 271.....	258
Hurd, Joseph; 2 L. D., 317.....	138	Paul v. Wiseman; 21 L. D., 12.....	370
Hyde, F. A.; 28 L. D., 284.....	296	Peavey, Gary B.; 31 L. D., 186.....	221, 353
Ikelheimer v. Chapman; 32 Ala., 676.....	346	Phifer v. Heaton; 27 L. D., 57.....	110
Johnston v. Morris; 72 Fed. Rep., 890.....	339		
Jones, W. A.; 1 L. D., 98.....	171		
Kansas, State of; 2 L. D., 695.....	76		
Kern Oil Co. <i>et al.</i> v. Clarke; 30 L. D., 550; 31 L. D., 288.....	94, 156, 222, 315, 320, 353		

TABLE OF CASES CITED.

XIII

	Page.		Page.
Pierro, John Marris; 1 L. D., 303.....	261	United States v. English; 107 Fed. Rep., 867.....	268
Powel, Ricard L.; 28 L. D., 216.....	322, 351	United States v. Flournoy, etc., Co.; 69 Fed. Rep., 886.....	440
Powers v. Courtney <i>et al.</i> ; 9 L. D., 480.....	54	United States v. Gratiot <i>et al.</i> ; 14 Pet., 526.....	284
Provensal, Victor H.; 30 L. D., 616....	133, 222, 400	United States v. Harris; 1 Abbott, U. S., 110.....	138
Rancho Buena Vista; 1 L. D., 210; 2 L. D., 366, 370; 5 L. D., 559; 6 L. D., 41; 13 L. D., 84; 14 L. D., 259; 19 L. D., 201.....	447	United States v. Healey; 160 U. S., 136....	279
Rankin, John M.; 21 L. D., 404; 28 L. D., 204.....	218	United States v. Ingram; 172 U. S., 327....	279
Reese, Hugh; 10 L. D., 541.....	279	United States v. Iron Silver Mining Co.; 24 Fed. Rep., 568.....	38
Richter, Elizabeth; 25 L. D., 1.....	405	United States v. Lancaster; 4 Wash., U. S., 64.....	138
Richter <i>et al.</i> v. State of Utah; 27 L. D., 95.....	110	United States v. Lane; 19 Fed. Rep., 910..	268
Riley v. Wells; 19 Lawyer's Cooperative Edition U. S. Reports, 648.....	195, 320	United States v. McTee <i>et al.</i> ; 13 L. D., 419.....	369
Roberts v. Oregon Central Military Road Co.; 19 L. D., 591.....	175	United States v. Missouri, Kansas and Texas Ry. Co.; 141 U. S., 358.....	200
Routh, Jennie; 13 L. D., 332.....	369	United States v. Moore; 95 U. S., 760.....	283
Royston v. Miller; 76 Fed. Rep., 50.....	180	United States v. Morris; 10 Wheat., 246....	138
St. Paul, Minneapolis and Manitoba R. R. Co. v. Forseth; 3 L. D., 446.....	171	United States v. Newman <i>et al.</i> ; 15 L. D., 224.....	55
St. Paul, Minneapolis and Manitoba Ry. Co. v. Gjuve; 1 L. D., 331.....	152	United States v. Oregon and California R. R. Co.; 176 U. S., 28.....	33, 152, 220
Salt Bluff Placer; 7 L. D., 549.....	390	United States v. Schuler; 6 McLean, 28 S. C.; 27 Fed. Cas., 878.....	267
Shaw v. Kellogg; 170 U. S., 312.....	297	United States v. Southern Pacific R. R. Co.; 146 U. S., 615.....	434
Shineberger, Joseph; 9 L. D., 379.....	356	United States v. Southern Pacific R. R. Co.; 168 U. S., 1.....	327
Sierra Lumber Co.; 31 L. D., 349.....	444	United States v. Southern Pacific R. R. Co.; 184 U. S., 49.....	329
Simmons v. Wagner; 101 U. S., 260.....	334	United States v. Stone; 2 Wall., 525.....	100
Smelting Co. v. Kemp; 104 U. S., 636....	38	United States v. Stores; 14 Fed. Rep., 824.....	268
Smith v. Crawford; 4 L. D., 449.....	138	United States v. Williams; 18 Fed. Rep., 475.....	268
Snedicor v. Mobley; 47 Ala., 505.....	346	United States v. Winona and St. Peter R. R. Co.; 165 U. S., 463.....	329
Snyder v. Ellison; 5 L. D., 353.....	357	Walters v. Northern Pacific R. R. Co.; 23 L. D., 492.....	138
South Dakota, State of; 22 L. D., 550.....	75	Washington, State of; 26 L. D., 74.....	233
Southern Pacific R. R. Co. v. Kanawyer; 23 L. D., 500.....	272	Wason Toll Road Co. v. Creede Town Site; 21 L. D., 351; 22 L. D., 145.....	408
Southwestern Mining Co.; 14 L. D., 597..	390	Webb v. Loughrey <i>et al.</i> ; 9 L. D., 440.....	139
Spalding v. Chandler; 160 U. S., 394.....	101	Webber v. Clark; 74 Cal., 11.....	450
Spaulding v. Northern Pacific R. R. Co.; 21 L. D., 57.....	152	Webster v. Luther; 163 U. S., 331.....	106
Spencer v. McDougal; 159 U. S., 62.....	195, 320, 433		113, 321, 430, 431
State v. Columbia George; 65 Pac. Rep., 604.....	440	Wheeler, Cyrus; 9 L. D., 271.....	279
Still, Abram A.; 13 L. D., 610.....	226	Wheeler, William D.; 30 L. D., 355.....	312, 354
Tameling v. U. S. Freehold Co.; 93 U. S., 644.....	206	Whitcher v. Southern Pacific R. R. Co.; 3 L. D., 459.....	226
Tilton, Daniel G.; 8 L. D., 368.....	279	White, Joseph S.; 30 L. D., 536.....	246
Timber Cases; 11 Fed. Rep., 81.....	268	Whitney v. Spratt; 64 Pac. Rep., 919.....	55
Trujillo, Juan de la Cruz; 28 L. D., 544....	334	Whitney v. Taylor; 158 U. S., 85.....	443
Tubbs v. Wilhoit; 138 U. S., 134.....	307	Wilcox v. Jackson; 13 Peters, 498.....	100, 320, 348
Turner v. Sawyer; 150 U. S., 578.....	180	Williams v. United States; 138 U. S., 514....	139, 177
Tyler, Charles; 26 L. D., 699.....	201	Wink, Arnold; 31 L. D., 47.....	81
Tyler v. Sturdy; 108 Mass., 196.....	407	Winona and St. Peter R. R. Co. v. Barney <i>et al.</i> ; 113 U. S., 618.....	339
Union Pacific R. R. Co. (Central Branch) v. Peterson; 28 L. D., 32.....	443	Winscott v. Northern Pacific R. R. Co.; 17 L. D., 274.....	213
United States v. Baltimore and Ohio R. R. Co.; 1 Hughes, 138, S. C.; 24 Fed. Cas., 973.....	285	Wolcott v. Des Moines Co.; 5 Wall., 681....	320, 433
United States v. Bowen; 100 U. S., 508....	430	Wolenberg, P., <i>et al.</i> ; 29 L. D., 302.....	71
United States v. Childs; 13 L. D., 553.....	369	Wolsey v. Chapman; 101 U. S., 755. 100, 195, 320, 349	
United States v. Colton Marble and Lime Co.; 146 U. S., 615.....	434	Wood v. Beach; 156 U. S., 548.....	195, 320
United States v. Connor; 138 U. S., 61.....	138	Wood v. Tyler; 22 L. D., 679.....	357
United States v. Conway; 175 U. S., 60....	206		

	Page.		Page.
Wright v. Roseberry; 121 U. S., 497.....	339	Young <i>et al.</i> v. Goldstein; 97 Fed. Rep., 303.	89
Wyatt's Administrator v. Rambo; 29 Ala., 510.....	346		
Wyoming, State of; 27 L. D., 35.....	339	Zephyr and Other Lodes; 30 L. D., 510....	38

TABLE OF OVERRULED AND MODIFIED CASES.

[From vol. 1 to 31, inclusive.]

[(*) The cases marked with a star are now authority. See Hessong v. Burgan, 9 L. D., 353.]

- Aldrich v. Anderson (2 L. D., 71); overruled, 15 L. D., 201.
- Americus v. Hall (29 L. D., 677); vacated on review, 30 L. D., 388.
- Anderson v. Tannehill *et al.* (10 L. D., 388); overruled, 18 L. D., 586.
- Atlantic and Pacific R. R. (5 L. D., 269); overruled, 27 L. D., 241.
- Baca Float No. Three (5 L. D., 705; 12 L. D., 676; 13 L. D., 624); vacated on review, 29 L. D., 44.
- Bailey, John W., *et al.* (3 L. D., 386); modified, 5 L. D., 513.
- Baker v. Hurst (7 L. D., 457); overruled, 8 L. D., 110.
- Barbour v. Wilson *et al.* (23 L. D., 462); vacated on review, 28 L. D., 62.
- Barbut, James (9 L. D., 514); overruled, 29 L. D., 698.
- Barlow, S. L. M. (5 L. D., 695); modified, 6 L. D., 648.
- Bartch v. Kennedy (3 L. D., 437); modified, 6 L. D., 217.
- Bennett, Peter W. (6 L. D., 672); overruled, 29 L. D., 565.
- Bivins v. Shelley (2 L. D., 282); modified, 4 L. D., 583.
- Blenkner v. Sloggy (2 L. D., 267); modified, 6 L. D., 217.
- Bosch, Gottlieb (8 L. D., 45); overruled, 13 L. D., 42.
- Box v. Ulstein (3 L. D., 143); modified, 6 L. D., 217.
- Brady v. Southern Pacific R. R. Co. (5 L. D., 407 and 658); overruled, 20 L. D., 259.
- Bradstreet *et al.* v. Rehm (21 L. D., 30); reversed on review, *id.*, 544.
- Brown, Joseph T. (21 L. D., 47); overruled, 31 L. D., 222.
- Brown v. Cagle (30 L. D., 8); vacated on review, 30 L. D., 148.
- Bundy v. Livingston (1 L. D., 152); overruled, 6 L. D., 284.
- Burkholder v. Skagen (4 L. D., 166); overruled, 9 L. D., 153.
- Buttery v. Sprout (2 L. D., 293); overruled, 5 L. D., 591.
- Cagle v. Mendenhall (20 L. D., 447); overruled, 23 L. D., 533.
- Cain *et al.* v. Addenda Mining Co. (24 L. D., 18); vacated on review, 29 L. D., 62.
- California and Oregon Land Co. (21 L. D., 344); overruled, 26 L. D., 453.
- California, State of (14 L. D., 253); vacated on review, 23 L. D., 230.
- California, State of (15 L. D., 10); overruled, 23 L. D., 423.
- California, State of (19 L. D., 585); vacated on review, 28 L. D., 57.
- California, State of, v. Moccettini (19 L. D., 359); overruled, 31 L. D., 335.
- California, State of, v. Pierce (3 C. L. O., 118); modified, 2 L. D., 854.
- California, State of, v. Smith (5 L. D., 543); overruled, 18 L. D., 343.
- Call v. Swaim (3 L. D., 46); overruled, 18 L. D., 373.
- Cameron Lode (13 L. D., 369); overruled, 25 L. D., 518.
- Camplan v. Northern Pacific R. R. Co. (28 L. D., 118); overruled, 29 L. D., 550.
- Case v. Church (17 L. D., 578); overruled, 26 L. D., 453.
- Castello v. Bonnie (20 L. D., 311); overruled, 22 L. D., 174.
- Cawood v. Dumas (22 L. D., 585); vacated on review, 25 L. D., 526.
- Central Pacific R. R. Co. v. Orr (2 L. D., 525); overruled, 11 L. D., 445.
- Chappell v. Clark (27 L. D., 334); modified, 27 L. D., 532.
- Childress *et al.* v. Smith (15 L. D., 89); overruled, 26 L. D., 453.
- Christofferson, Peter (3 L. D., 329); modified, 6 L. D., 284, 624.
- Clafin v. Thompson (28 L. D., 279); overruled, 29 L. D., 693.
- Colorado, State of (7 L. D., 490); overruled, 9 L. D., 408.
- Cooper, John W. (15 L. D., 285); overruled, 25 L. D., 113.
- Corlis v. Northern Pacific R. R. Co. (23 L. D., 265); vacated on review, 26 L. D., 652.
- Cornell v. Chilton (1 L. D., 153); overruled, 6 L. D., 483.
- Cowles v. Huff (24 L. D., 81); modified, 28 L. D., 515.
- Cox, Allen H. (30 L. D., 90, 468); vacated on review, 31 L. D., 114.
- Crowston v. Seal (5 L. D., 213); overruled, 18 L. D., 586.
- Dakota Central R. R. Co. v. Downey (8 L. D., 115); modified, 20 L. D., 131.
- Dennison & Willits (11 C. L. O., 261); overruled, 26 L. D., 123.
- Devoe, Lizzie A. (5 L. D., 4); modified, 5 L. D., 429.

- Downman *v.* Moss (19 L. D., 526); overruled, 25 L. D., 82.
- Dudymott *v.* Kansas Pacific R. R. Co. (5 C. L. O., 69); overruled, 1 L. D., 345.
- Dysart, Francis J. (23 L. D., 282); modified, 25 L. D., 188.
- Easton, Francis E. (27 L. D., 600); overruled, 30 L. D., 355.
- * Elliott *v.* Ryan (7 L. D., 322); overruled, 8 L. D., 110.
- Emblen *v.* Weed (16 L. D., 28); overruled, 17 L. D., 220.
- Epley *v.* Trick (8 L. D., 110); overruled, 9 L. D., 359.
- Ewing *v.* Rickard (1 L. D., 146); overruled, 6 L. D., 483.
- Falconer *v.* Price (19 L. D., 167); overruled, 24 L. D., 264.
- Ferrell *et al. v.* Hoge *et al.* (18 L. D., 81); overruled, 25 L. D., 351.
- Fish, Mary (10 L. D., 606); modified, 13 L. D., 511.
- Fitch *v.* Sioux City and Pacific R. R. Co. (216 L. and R., 184); overruled, 17 L. D., 43.
- Fleming *v.* Bowe (13 L. D., 78); overruled, 23 L. D., 175.
- Florida Mesa Ditch Co. (14 L. D., 265); overruled 27 L. D., 421.
- Florida Railway and Navigation Co. *v.* Miller (3 L. D., 324); modified, 6 L. D., 716; overruled, 9; L. D., 237.
- Florida, State of (17 L. D., 355); reversed on review, 19 L. D., 76.
- Forgeot, Margaret (7 L. D., 280); overruled, 10 L. D., 629.
- Fort Boise Hay Reservation (6 L. D., 16); overruled, 27 L. D., 505.
- Freeman *v.* Texas Pacific R. R. Co. (2 L. D., 550), overruled, 7 L. D., 18.
- Galliher, Marie (8 C. L. O., 57); overruled, 1 L. D., 17.
- Garrett, Joshua (2 C. L. O., 1005); overruled, 5 L. D., 158.
- Gates *v.* California and Oregon R. R. Co. (5 C. L. O., 150); overruled, 1 L. D., 336.
- Gauger, Henry (10 L. D., 221); overruled, 24 L. D., 81.
- Gohrman *v.* Ford (8 C. L. O., 6); overruled, 4 L. D., 580.
- Goldstein *v.* Juneau Townsite (23 L. D., 417); vacated and annulled, 31 L. D., 88.
- Gowdy *v.* Connell (27 L. D., 56); vacated on review, 28 L. D., 240.
- Gowdy *v.* Gilbert (19 L. D., 17); overruled, 26 L. D., 453.
- Gowdy *et al. v.* Kismet Gold Mining Co. (22 L. D., 624); modified on review, 24 L. D., 191.
- Grampian Lode (1 L. D., 544); overruled, 25 L. D., 495.
- Gregg *et al. v.* State of Colorado (15 L. D., 151); modified, 30 L. D., 310.
- Grinnell *v.* Southern Pacific R. R. Co. (22 L. D., 438); vacated on review, 23 L. D., 489.
- Gulf and Ship Island R. R. Co. (16 L. D., 236); modified on review, 19 L. D., 534.
- Hansbrough, Henry C. (5 L. D., 155); overruled, 29 L. D., 59.
- Hardee, D. C. (7 L. D., 1); overruled, 29 L. D., 698.
- Hardee *v.* United States (8 L. D., 391; 16 L. D., 499); overruled, 29 L. D., 698.
- Hardin, James A. (10 L. D., 313); recalled and revoked, 14 L. D., 233.
- Harrison, Luther (4 L. D., 179); overruled, 17 L. D., 216.
- Hastings and Dakota Ry. Co. *v.* Christenson *et al.* (22 L. D., 257); overruled, 28 L. D., 572.
- Hayden *v.* Jamison (24 L. D., 403); vacated on review, 26 L. D., 373.
- Heilman *v.* Syverson (15 L. D., 184); overruled, 23 L. D., 119.
- Herrick, Wallace H. (24 L. D., 23); overruled, 25 L. D., 113.
- Hickey, M. A., and Edward (3 L. D., 83); modified, 5 L. D., 256.
- Holden, Thomas A. (16 L. D., 493); overruled, 29 L. D., 166.
- Holland, G. W. (6 L. D., 20); overruled, 6 L. D., 639, and 12 L. D., 436.
- Hooper, Henry (6 L. D., 624); modified, 9 L. D., 86, 284.
- Howard *v.* Northern Pacific R. R. Co. (23 L. D., 6); overruled, 28 L. D., 128.
- Howell, John H. (24 L. D., 35); overruled, 28 L. D., 204.
- Huls, Clara (9 L. D., 401); modified, 21 L. D., 377.
- Hyde, F. A., *et al.* (27 L. D., 472); vacated on review, 28 L. D., 285.
- Hyde *et al. v.* Warren *et al.* (14 L. D., 576); see 19 L. D., 64.
- Inman *v.* Northern Pacific R. R. Co. (24 L. D., 318); overruled, 28 L. D., 95.
- Iowa Railroad Land Company (23 L. D., 79; 24 L. D., 125); vacated on review, 29 L. D., 79.
- Jacks *v.* Belard *et al.* (29 L. D., 369); vacated on review, 30 L. D., 345.
- Jones, James A. (3 L. D., 176); overruled, 8 L. D., 448.
- Jones *v.* Kennett (6 L. D., 688); overruled, 14 L. D., 429.
- Kackman, Peter (1 L. D., 86); overruled, 16 L. D., 464.
- Kemper *v.* St. Paul and Pacific R. R. Co. (2 C. L. L., 805); overruled, 18 L. D., 101.
- King *v.* Eastern Oregon Land Co. (23 L. D., 579); modified, 30 L. D., 19.
- Kiser *v.* Keech (7 L. D., 25); overruled, 23 L. D., 119.
- Knight, Albert B., *et al.* (30 L. D., 227); overruled, 31 L. D., 64.
- Kniskern *v.* Hastings and Dakota Ry. Co. (6 C. L. O., 50); overruled, 1 L. D., 362.
- Krigbaum, James T. (12 L. D., 617); overruled, 26 L. D., 448.
- Lasselle *v.* Missouri, Kansas and Texas Ry. Co. (3 C. L. O., 10); overruled, 14 L. D., 278.
- Las Vegas Grant (13 L. D., 646, and 15 L. D., 58); revoked on review, 27 L. D., 683.

- Laughlin *v.* Martin (18 L. D., 112); modified, 21 L. D., 40.
- Lemmons, Lawson H. (19 L. D., 37); overruled, 26 L. D., 389.
- Leonard, Sarah (1 L. D., 41); overruled, 16 L. D., 464.
- Lindberg, Anna C. (3 L. D., 95); modified, 4 L. D., 299.
- Linderman *v.* Wait (6 L. D., 689); overruled, 13 L. D., 459.
- Little Pet Lode (4 L. D., 17); overruled, 25 L. D., 550.
- Lock Lode (6 L. D., 105); overruled, 26 L. D., 123.
- Lockwood, Francis A. (20 L. D., 361); modified, 21 L. D., 200.
- Louisiana, State of (8 L. D., 126); modified on review, 9 L. D., 157.
- Louisiana, State of (24 L. D., 231); vacated on review, 26 L. D., 5.
- Lucy B. Hussey Lode (5 L. D., 93); overruled, 25 L. D., 495.
- Lynch, Patrick (7 L. D., 33); overruled, 13 L. D., 713.
- Madigan, Thomas (8 L. D., 188); overruled, 27 L. D., 448.
- Mason *v.* Cromwell (24 L. D., 248); vacated on review, 26 L. D., 369.
- Masten, E. C. (22 L. D., 337); overruled, 25 L. D., 111.
- Mather *et al.* *v.* Hackley's Heirs (15 L. D., 487); vacated on review, 19 L. D., 48.
- Maughan, George W. (1 L. D., 25); overruled, 7 L. D., 94.
- McCalla *v.* Acker (29 L. D., 203); vacated on review, 30 L. D., 277.
- McDonogh School Fund (11 L. D., 378); overruled, 30 L. D., 616.
- McFadden *et al.* *v.* Mountain View Mining and Milling Co. (26 L. D., 530); vacated on review, 27 L. D., 358.
- McGee, Edward D. (17 L. D., 285); overruled, 29 L. D., 166.
- McGrann, Owen (5 L. D., 10); overruled, 24 L. D., 502.
- McKernan *v.* Bailey (16 L. D., 368); overruled, 17 L. D., 494.
- McNamara *et al.* *v.* State of California (17 L. D., 296); overruled, 22 L. D., 666.
- Meyer, Peter (6 L. D., 639); modified, 12 L. D., 436.
- Miller *v.* Sebastian (19 L. D., 288); overruled, 26 L. D., 448.
- Milton *et al.* *v.* Lamb (22 L. D., 339); overruled, 25 L. D., 550.
- Milwaukee, Lake Shore and Western Ry. Co. (12 L. D., 79); overruled, 29 L. D., 112.
- Miner *v.* Marriott *et al.* (2 L. D., 709); modified, 28 L. D., 224.
- Monitor Lode (18 L. D., 358); overruled, 25 L. D., 495.
- Moore, Charles H. (16 L. D., 204); overruled, 27 L. D., 482.
- Morgan *v.* Craig (10 C. L. O., 234); overruled, 5 L. D., 303.
- Nebraska, State of (18 L. D., 124); overruled, 28 L. D., 358.
- Nebraska, State of, *v.* Dorrington (2 C. L. L., 647) overruled, 26 L. D., 123.
- Neilsen *v.* Central Pacific R. R. Co. *et al.* (26 L. D., 252); modified on review, 30 L. D., 216.
- Newbanks *v.* Thompson (22 L. D., 490); overruled, 29 L. D., 108.
- Newton, Walter (22 L. D., 322); modified, 25 L. D., 188.
- New York Lode and Millsite (5 L. D., 513); overruled, 27 L. D., 373.
- Northern Pacific R. R. Co. (20 L. D., 191); modified, 22 L. D., 224; overruled, 29 L. D., 550.
- Northern Pacific R. R. Co. *v.* Bowman (7 L. D., 238); modified, 18 L. D., 224.
- Northern Pacific R. R. Co. *v.* Burns (6 L. D., 21); overruled, 20 L. D., 191.
- Northern Pacific R. R. Co. *v.* Loomis (21 L. D., 395); overruled, 27 L. D., 464.
- Northern Pacific R. R. Co. *v.* Marshall *et al.* (17 L. D., 545); overruled, 28 L. D., 174.
- Northern Pacific R. R. Co. *v.* Miller (7 L. D., 100); overruled, 16 L. D., 229.
- Northern Pacific R. R. Co. *v.* Sherwood (28 L. D., 126); overruled, 29 L. D., 550.
- Northern Pacific R. R. Co. *v.* Symons (22 L. D., 686); overruled, 28 L. D., 95.
- Northern Pacific R. R. Co. *v.* Urquhart (8 L. D., 365); overruled, 28 L. D., 126.
- Northern Pacific R. R. Co. *v.* Yantis (8 L. D., 58); overruled, 12 L. D., 127.
- Nyman *v.* St. Paul, Minneapolis and Manitoba Ry. Co. (5 L. D., 396); overruled, 6 L. D., 750.
- Olson *v.* Traver *et al.* (26 L. D., 350 and 628); overruled, 29 L. D., 480; 30 L. D., 382.
- Oregon Central Military Wagon Road Co. *v.* Hart (17 L. D., 480); overruled, 18 L. D., 543.
- Pacific Slope Lode (12 L. D., 686); overruled, 25 L. D., 518.
- Papina *v.* Alderson (1 B. L. P., 91); modified, 5 L. D., 256.
- Patterson, Charles E. (3 L. D., 260); modified, 6 L. D., 284, 624.
- Paul Jones Lode (28 L. D., 120); modified, 31 L. D., 359.
- Paul *v.* Wiseman (21 L. D., 12); overruled, 27 L. D., 522.
- Pecos Irrigation and Improvement Co. (15 L. D., 470); overruled, see 18 L. D., 168 and 268.
- Phelps, W. L. (8 C. L. O., 139); overruled, 2 L. D., 854.
- Phillips, Alonzo (2 L. D., 321); overruled, 15 L. D., 424.
- Pike's Peak Lode (14 L. D., 47); overruled, 20 L. D., 204.
- Popple, James (12 L. D., 433); overruled, 13 L. D., 588.
- Powell, D. C. (6 L. D., 302); modified, 15 L. D., 477.
- Pringle, Wesley, (13 L. D., 519); overruled, 29 L. D., 599.
- Puyallup Allotments (20 L. D., 157); modified, 29 L. D., 628.

- Rancho Alisal (1 L. D., 173); overruled, 5 L. D., 320.
- Rankin, John M. (20 L. D., 272); reversed on review, 21 L. D., 404.
- * Reed v. Buffington (7 L. D., 154); overruled, 8 L. D., 110.
- Rico Townsite (1 L. D., 556); modified, 5 L. D., 256.
- Roberts v. Oregon Central Military Road Co. (19 L. D., 591); overruled, 31 L. D., 174.
- Robinson, Stella G. (12 L. D., 443); overruled, 13 L. D., 1.
- Rogers, Horace B. (10 L. D., 29); overruled, 14 L. D., 321.
- Rogers v. Atlantic and Pacific R. R. Co. (6 L. D., 565); overruled, 8 L. D., 165.
- * Rogers v. Lukens (6 L. D., 111); overruled, 8 L. D., 110.
- Sayles, Henry P. (2 L. D., 88); modified, 6 L. D., 797.
- Schweitzer v. Hilliard (19 L. D., 294); overruled, 26 L. D., 639.
- Serrano v. Southern Pacific R. R. Co. (6 C. L. O., 93); overruled, 1 L. D., 380.
- Shanley v. Moran (1 L. D., 162); overruled, 15 L. D., 424.
- Shineberger, Joseph (8 L. D., 231); overruled, 9 L. D., 202.
- Sipchen v. Ross (1 L. D., 634); modified, 4 L. D., 152.
- Smead v. Southern Pacific R. R. Co. (21 L. D., 432); vacated on review, 29 L. D., 135.
- Southern Pacific R. R. Co. (15 L. D., 460); reversed on review, 18 L. D., 275.
- Spaulding v. Northern Pacific R. R. Co. (21 L. D., 57); overruled, 31 L. D., 151.
- Spencer, James (6 L. D., 217); modified, 6 L. D., 772, and 8 L. D., 467.
- State of California (14 L. D., 253); vacated on review, 23 L. D., 230.
- State of California (15 L. D., 10); overruled, 23 L. D., 423.
- State of California (19 L. D., 585); vacated on review, 28 L. D., 57.
- State of California v. Moccettini (19 L. D., 359); overruled, 31 L. D., 335.
- State of California v. Pierce (3 C. L. O., 118); modified, 2 L. D., 854.
- State of California v. Smith (5 L. D., 543); overruled, 18 L. D., 343.
- State of Colorado (7 L. D., 490); overruled, 9 L. D., 408.
- State of Florida (17 L. D., 355); reversed on review, 19 L. D., 76.
- State of Louisiana (8 L. D., 126); modified on review, 9 L. D., 157.
- State of Louisiana, (24 L. D., 231); vacated on review, 26 L. D., 5.
- State of Nebraska (18 L. D., 124); overruled, 28 L. D., 358.
- State of Nebraska v. Dorrington (2 C. L. L., 647); overruled, 26 L. D., 123.
- Stewart *et al.* v. Rees *et al.* (21 L. D., 446); overruled, 29 L. D., 401.
- St. Paul, Minneapolis and Manitoba Ry. Co. (8 L. D., 255); modified, 13 L. D., 354.
- St. Paul, M. & M. Ry. Co. v. Hagen (20 L. D., 249); overruled, 25 L. D., 86.
- St. Paul, M. & M. Ry. Co. v. Fogelberg (29 L. D., 291); vacated on review, 30 L. D., 191.
- Stricker, Lizzie (15 L. D., 74); overruled, 18 L. D., 283.
- Sweeney v. Northern Pacific R. R. Co. (20 L. D., 394); overruled, 28 L. D., 174.
- Sweeten v. Stevenson (3 L. D., 249); overruled, 3 L. D., 248.
- Taft v. Chapin (14 L. D., 593); overruled, 17 L. D., 414.
- Talkington's Heirs v. Hempfling (2 L. D., 46); overruled, 14 L. D., 200.
- Tate, Sarah J. (10 L. D., 469); overruled, 21 L. D., 211.
- Taylor v. Yates *et al.* (8 L. D., 279); reversed on review, 10 L. D., 242.
- Traugh v. Ernst (2 L. D., 212); overruled, 3 L. D., 98.
- Tripp v. Stewart (7 C. L. O., 39); modified, 6 L. D., 795.
- Tucker v. Florida Ry. & Nav. Co. (19 L. D., 414); overruled, 25 L. D., 233.
- Tupper v. Schwarz (2 L. D., 623); overruled, 6 L. D., 623.
- Turner v. Lang (1 C. L. O., 51); modified, 5 L. D., 256.
- Turner v. Cartwright (17 L. D., 414); modified, 21 L. D., 40.
- United States v. Bush (13 L. D., 529); overruled, 18 L. D., 441.
- United States v. Dana (18 L. D., 161); modified, 28 L. D., 45.
- Vine, James (14 L. D., 527); modified, 14 L. D., 622.
- Walker v. Prosser (17 L. D., 85); reversed on review, 18 L. D., 425.
- Walker v. Southern Pacific R. R. Co. (24 L. D., 172); overruled, 28 L. D., 174.
- Walters, David (15 L. D., 136); decision revoked, 24 L. D., 58.
- Wasmund v. Northern Pacific R. R. Co. (23 L. D., 445); vacated on review, 29 L. D., 224.
- Waterhouse, William W. (9 L. D., 131); overruled, 18 L. D., 586.
- Watson, Thomas E. (4 L. D., 169); modified, 6 L. D., 71.
- Weber, Peter (7 L. D., 476); overruled on review, 9 L. D., 150.
- Werden v. Schlecht (20 L. D., 523); overruled, 24 L. D., 45.
- Wickstrom v. Calkins (20 L. D., 459); modified, 21 L. D., 553; overruled, 22 L. D., 392.
- Wilkins, Benjamin C. (2 L. D., 129); modified, 6 L. D., 797.

Willamette Valley and Cascade Mountain Wagon Road Co. v. Chapman (13 L. D., 61); overruled, 20 L. D., 259.
 Willamette Valley and Cascade Mountain Wagon Road Co. v. Bruner (22 L. D., 654); vacated on review, 26 L. D., 357.

Willingbeck, Christian P. (3 L. D., 383); modified, 5 L. D., 409.
 Willis, Eliza (22 L. D., 426); overruled, 26 L. D., 436.

TABLE OF CIRCULARS AND INSTRUCTIONS.

	Page.		Page.
February 13, 1901.—Saline land; mining laws; act of January 31, 1901.....	131	January 15, 1902.—Regulations concerning the selection of desert lands by certain States.....	228
July 5, 1901.—Homestead entry; Wichita and Kiowa, Comanche and Apache lands; qualifications	9	February 19, 1902.—Indian lands; commissions; acts of March 2, 1889, and August 15, 1894.....	250
July 8, 1901.—Right of way; telegraph and telephone lines, electrical plants, canals, reservoirs, etc	13	February 19, 1902.—Forest reserve; lieu selection; act of June 4, 1897.....	251
July 15, 1901.—Revised Rules of Practice.....	527	March 26, 1902.—Affidavits; application to make entry; final proof; act of March 11, 1902.....	274
July 24, 1901.—Private claim; certificate of location; notice; act of June 2, 1858.....	45	March 28, 1902.—Location and assignment of military bounty land warrants.....	277
July 24, 1901.—Homestead; commutation; Wichita and Kiowa, Comanche and Apache lands.....	46	April 12, 1902.—Execution of affidavits, proofs, and oaths before deputy clerks; act of March 11, 1902.....	286
July 26, 1901.—General mining circular.....	453	April 26, 1902.—Practice; notice; rule 100 construed.....	318
August 5, 1901.—Wichita and Kiowa, Comanche and Apache lands; regulations..	62	May 12, 1902.—Settlers in forest reserves; act of April 15, 1902.....	331
August 6, 1901.—Wichita and Kiowa, Comanche and Apache lands; regulations of August 5, 1901, amended	63	May 14, 1902.—Private land claim; small holding; act of March 3, 1891.....	332
August 14, 1901.—Wichita and Kiowa, Comanche and Apache lands; regulations of August 5, 1901, amended.....	67	June 3, 1902.—Patent; Louisiana agricultural and mechanical college	348
August 17, 1901.—Indian lands; commissions; act of January 14, 1889	72	June 19, 1902.—Commutation of and second homestead entries; act of May 22, 1902.....	358
September 6, 1901.—Indian lands; commissions; acts of January 14, 1889, and January 26, 1901	106	June 26, 1902.—Regulations concerning right of way for canals, ditches, and reservoirs.....	503
September 16, 1901.—Wichita and Kiowa, Comanche and Apache lands; disposition after expiration of "sixty days" period ..	107	July 9, 1902.—Confirmation; section 7, act of March 3, 1891	368
November 14, 1901.—Saline land; nonsaline affidavit.....	130, 131	July 7, 1902.—Forest reserve; lieu selection; acts of June 4, 1897, and June 6, 1900.....	372
November 14, 1901.—Nonmineral affidavit; Mississippi, Louisiana, Arkansas, Florida.	135	July 21, 1902.—Settlers on Navajo Indian Reservation; act of July 1, 1902	381
December 5, 1901.—Desert land; act of August 18, 1894; sparse growth of trees	149	July 25, 1902.—Lands in former Ute Indian Reservation subject to homestead entry; act of June 13, 1902.....	388
December 6, 1901.—Wichita and Kiowa, Comanche and Apache lands; mining claim within town site; act of June 6, 1900.....	154	July 29, 1902.—Sale of Umatilla Indian Reservation lands; act of July 1, 1902....	392
December 12, 1901.—Forest reservation; use of timber and stone; paragraph 21 of regulations amended.....	173	September 9, 1902.—Entries on lands withdrawn for the construction of irrigation works for the reclamation of arid lands; act of June 17, 1902.....	420
December 23, 1901.—Forest reservation; pasturing of live stock; paragraph 13 of regulations amended	182	September 19, 1902.—Timber cutting; act of July 1, 1898	412
January 3, 1902.—School land; lease; act of June 21, 1898	188	September 22, 1902.—Settlers on railroad and wagon-road grants.....	424
January 20, 1902.—School land; authority of local officers; California.....	212	October 25, 1902.—Homestead entries on lands temporarily withdrawn for irrigation purposes; act of June 17, 1902.....	423
January 31, 1902.—Railroad grant; Northern Pacific; act of July 2, 1864; joint resolution of May 31, 1870	219	October 29, 1902.—School land; indemnity selection; assignment of base.....	438
February 10, 1902.—Approximation; exchange of lands; act of June 4, 1897....	225		

	Page.		Page.
November 28, 1902.—Desert-land entry; compactness; section 1, act of March 3, 1877.....	441	December 22, 1902.—Oklahoma land; homestead; commutation; act of June, 6, 1900	445
December 4, 1902.—Alaskan lands; homestead; soldiers' additional; assignee....	441		

CIRCULARS AND INSTRUCTIONS CITED, CONSTRUED, AND MODIFIED.

	Page.		Page.
October 8, 1874.—Location of scrip; C. P. L. L., 797.....	260	June 30, 1897.—Forest reserve lieu selections; 24 L. D., 589.....	176
March 12, 1877.—Price of lands within railroad limits; 4 C. L. O., 22.....	278	August 1, 1898.—New Mexico; selections; accounts; 27 L. D., 302.....	262
September 3, 1880.—Desert-land entry; compactness; 2 C. L. L., 1378.....	355	October 10, 1898.—Section 7, act March 3, 1891; 27 L. D., 522.....	370
June 27, 1887.—Desert-land entry; final proof; 5 L. D., 708.....	279	November 4, 1898.—Right of way; 27 L. D., 663	14, 18
September 15, 1887.—Desert-land entry; double-minimum land; 6 L. D., 145....	279, 280	February 14, 1899.—Adjustment Northern Pacific grant; 28 L. D., 103.....	255
May 11, 1888.—Desert-land entry; 6 L. D., 662.....	150	May 9, 1899.—Forest reserves; 28 L. D., 521.	221
February 13, 1889.—Railroad grant; act of March 3, 1887; 8 L. D., 348.....	427	December 18, 1899.—Forest reserve lieu selections; 29 L. D., 391.....	252
May 8, 1891.—Section 7, act March 3, 1891; 12 L. D., 450.....	369	February 10, 1900.—Timber cutting; 29 L. D., 572.....	414
July 1, 1891.—Section 7, act March 3, 1891; 13 L. D., 1.....	369	March 6, 1900.—Forest reserve lieu selections; 29 L. D., 580.....	251, 322
December 19, 1893.—School indemnity; forest reservations; 17 L. D., 576.....	337	March 9, 1900.—Forest reserve lieu selections; 29 L. D., 594.....	215
July 9, 1894.—Railroad selections; mineral lands; 19 L. D., 21.....	395	April 4, 1900.—Forest reserve lieu selections; 30 L. D., 23.....	176
February 18, 1896.—Bounty-land warrants; 27 L. D., 218.....	113, 277, 322	June 27, 1900.—Right of way; 30 L. D., 325.	14, 365
July 9, 1896.—Commutation of homesteads; 26 L. D., 544.....	160	June 30, 1900.—Approximation; act June 4, 1897; 30 L. D., 105.....	225
November 27, 1896.—Right of way; 23 L. D., 458.....	408	April 10, 1901.—Indian allotment; 30 L. D., 546.....	343
December 23, 1896.—Right of way; 23 L. D., 519.....	361	July 24, 1901.—Comanche, Kiowa, and Apache lands; 31 L. D., 46.....	51
June 3, 1897.—Soldiers' additional homestead certificate; 24 L. D., 502.....	351	August 17, 1901.—Commissions; Chippewa lands; 31 L. D., 72.....	106, 251
		February 10, 1902.—Forest reserve lieu selections; 31 L. D., 225.....	373

ACTS OF CONGRESS CITED AND CONSTRUED.

	Page.		Page.
April 20, 1818 (3 Stat., 466), land office fees.	75	March 3, 1853 (10 Stat., 244), price of land.	199, 278
March 3, 1819 (3 Stat., 520), military reservation.....	284	Sec. 6, school lands.....	187, 335
March 3, 1819 (3 Stat., 528), sec. 3, private claim.....	344	Sec. 7, indemnity school lands.....	335
May 20, 1826 (4 Stat., 179), school land....	336	July 22, 1854 (10 Stat., 308), secs. 5 and 6, school lands.....	189
April 28, 1828 (4 Stat., 264), military reservation.....	284	Sec. 8, private claim.....	204
March 2, 1831 (4 Stat., 472), timber trespass.	267	March 3, 1855 (10 Stat., 701), bounty land warrant.....	223
September 4, 1841 (5 Stat., 453), preemption.....	199	June 3, 1856 (11 Stat., 20), railroad grant.	340
February 2, 1848 (9 Stat., 922), Mexican treaty.....	339	March 3, 1857 (11 Stat., 195), Minnesota railroad grant.....	339
September 9, 1850 (9 Stat., 452), California.	339	June 2, 1858 (11 Stat., 294), sec. 3, certificates of location.....	45, 133, 344, 400
September 28, 1850 (9 Stat., 519) swamp grant.....	335	February 26, 1859 (11 Stat., 385), school land.....	336
		March 8, 1859 (12 Stat., 975), Indian treaty.	243

	Page.		Page.
June 22, 1860 (12 Stat., 85), sec. 11, private claims.....	260	March 3, 1875 (18 Stat., 482), right of way.....	120, 411
May 20, 1862 (12 Stat., 392), sec. 1, homestead.....	26, 199	May 5, 1876 (19 Stat., 52), mining claim.....	135
July 1, 1862 (12 Stat., 489), railroad grant.....	442	July 4, 1875 (19 Stat., 73), repealing sec. 2303, R. S.....	136
March 3, 1863 (12 Stat., 772), Kansas railroad grant.....	199	July 31, 1876 (19 Stat., 102, 121), survey of private claims.....	211
March 21, 1864 (13 Stat., 35), homestead.....	171	January 12, 1877 (19 Stat., 221), saline lands.....	390
May 5, 1864 (13 Stat., 64), Minnesota railroad grant.....	32, 432	March 3, 1877 (19 Stat., 377), desert land.....	277, 354
May 5, 1864 (13 Stat., 66), Wisconsin railroad grant.....	340	Sec. 1, desert land.....	311, 441
July 2, 1864 (13 Stat., 355), wagon-road grant.....	215	Sec. 2, desert land.....	149
July 2, 1864 (13 Stat., 356), railroad grant.....	442	Sec. 5, desert land.....	276
July 2, 1864 (13 Stat., 365), Northern Pacific grant.....	31, 32, 109, 151, 219, 432	June 3, 1878 (20 Stat., 89), timber-land entry.....	35, 201, 264, 401, 408
June 21, 1866 (14 Stat., 66), homestead.....	26, 135	June 14, 1878 (20 Stat., 113), sec. 1, timber culture.....	226
July 4, 1866 (14 Stat., 85), sec. 5, mineral land.....	135	March 3, 1879 (20 Stat., 472), additional homestead.....	201
July 23, 1866 (14 Stat., 218), California lands.....	305	July 1, 1879 (21 Stat., 46), additional homestead.....	201
Sec. 6, indemnity school land.....	333	May 14, 1880 (21 Stat., 140), sec. 2, contestant.....	343, 409
Sec. 7, private claims.....	446	Sec. 3, settlement.....	48, 59, 81, 188
July 26, 1866 (14 Stat., 251), mining claim.....	135	June 15, 1880 (21 Stat., 237), sec. 2, homestead.....	143, 218, 435
July 26, 1866 (14 Stat., 289), Kansas railroad grant.....	199	Sec. 3, price of land.....	201
July 27, 1866 (14 Stat., 292), Pacific railroad grant.....	271, 273, 278, 327, 328, 434	June 16, 1880 (21 Stat., 287), repayment.....	271, 278, 354
December 26, 1866 (14 Stat., 374), wagon-road grant.....	215	Sec. 2, repayment.....	123, 311
February 25, 1867 (14 Stat., 409), wagon-road grant.....	175	March 3, 1883 (22 Stat., 487), Alabama lands.....	136
August 28, 1868 (15 Stat., 581), Indian treaty.....	366	May 1, 1884 (23 Stat., 15, 17), Government service.....	262
February 24, 1869 (15 Stat., 673), Indian treaty.....	147	May 17, 1884 (23 Stat., 24), Alaska.....	88
March 3, 1869 (15 Stat., 342), private claim.....	205	July 4, 1884 (23 Stat., 96), Indian homestead.....	418
May 31, 1870 (16 Stat., 378), Northern Pacific grant.....	151, 219	July 5, 1884 (23 Stat., 103), abandoned military reservation.....	115, 193
July 9, 1870 (16 Stat., 217), mineral land.....	135	February 25, 1885 (23 Stat., 321), illegal inclosure.....	295
March 3, 1871 (16 Stat., 573), Southern Pacific.....	278, 326, 327, 434	March 3, 1885 (23 Stat., 340), Umatilla lands.....	392
April 5, 1872 (17 Stat., 649), Valentine scrip.....	259	March 3, 1885 (23 Stat., 478, 499), survey of private claims.....	211
May 10, 1872 (17 Stat., 91), mining claim.....	135	July 6, 1886 (24 Stat., 123), Atlantic and Pacific forfeiture.....	278, 327, 434
June 5, 1872 (17 Stat., 226), Bitter Root Valley.....	170, 243	July 12, 1886 (24 Stat., 144), Louisiana Agricultural and Mechanical College.....	348
June 8, 1872 (17 Stat., 233), soldier's homestead.....	170, 351, 429	February 3, 1887 (24 Stat., 388), sec. 4, non-reservation Indians.....	417
February 18, 1873 (17 Stat., 465), mineral land.....	135	Sec. 5, land occupied by religious society.....	324
March 3, 1873 (17 Stat., 530, 539), Chippewa Indians.....	316	March 3, 1887 (24 Stat., 556), adjustment of railroad grants.....	426
March 3, 1873 (17 Stat., 605), soldiers' additional homestead.....	351	Sec. 5, purchaser of railroad lands.....	326, 434
March 3, 1873 (17 Stat., 607), mineral land.....	135	February 18, 1886 (25 Stat., 35), right of way.....	192
February 11, 1874 (18 Stat., 15), sec. 2, Bitter Root Valley.....	244	August 9, 1888 (25 Stat., 392), Indian allotment.....	417
June 18, 1874 (18 Stat., 80), wagon-road grant.....	215	January 14, 1889 (25 Stat., 642), Chippewa lands.....	251
June 22, 1874 (18 Stat., 146, 173), Bitter Root Valley.....	244	January 14, 1889 (25 Stat., 642), sec. 6, Chippewa lands.....	73, 106
June 22, 1874 (18 Stat., 194), railroad indemnity.....	162, 175, 424	February 22, 1889 (25 Stat., 676), Washington admitted.....	386
March 3, 1875 (18 Stat., 402, 420), Indian homestead.....	418	March 2, 1889 (25 Stat., 854), sec. 1, private entry.....	133, 201, 223, 400
		Sec. 2, second homestead.....	25, 431
		Sec. 5, additional homestead.....	129, 226
		March 2, 1889 (25 Stat., 883), Sioux lands.....	246
		Sec. 21, Sioux lands.....	250

	Page.
March 2, 1889 (25 Stat., 980, 1005), sec. 13, Oklahoma lands.....	49
April 1, 1889 (26 Stat., 1544), Oklahoma lands.....	50
May 2, 1890 (26 Stat., 81), sec. 20, Oklahoma lands.....	87, 168, 247
Sec. 21, Oklahoma lands.....	50
Sec. 22, Oklahoma lands.....	145
May 26, 1890 (26 Stat., 121), amending section 2294, R. S.....	48, 286
June 20, 1890 (26 Stat., 169), water reserve lands.....	247
August 29, 1890 (26 Stat., 369), railroad lands.....	425
August 30, 1890 (26 Stat., 371, 391), area of entry.....	399
August 30, 1890 (26 Stat., 371, 391), reservoir site.....	424
September 29, 1890 (26 Stat., 496), railroad forfeiture.....	151
Sec. 3, purchase.....	226
February 28, 1891 (26 Stat., 796), indemnity school land.....	336
March 3, 1891 (26 Stat., 854), sec. 8, private claim.....	333
Sec. 14, private claim.....	333
Sec. 16, private claim.....	323, 332
Sec. 17, private claim.....	323, 332
Sec. 18, private claim.....	332
March 3, 1891 (26 Stat., 989), sec. 16, Oklahoma lands.....	49
Sec. 36, Oklahoma school lands.....	269
March 3, 1891 (26 Stat., 1093), timber trespass.....	413
March 3, 1891 (26 Stat., 1095), sec. 2, desert land.....	12, 279
Sec. 5, homestead.....	87, 146
Sec. 7, confirmation.....	368
March 3, 1891 (26 Stat., 413), sec. 8, timber cutting.....	413
March 3, 1891 (26 Stat., 1095), sec. 2, desert land.....	441
Sec. 9, public sale.....	201
Sec. 11, Alaska town site.....	88
Secs. 18 to 21, right of way.....	14, 232
Sec. 19, right of way.....	365
Sec. 24, forest reserve.....	372
July 26, 1892 (27 Stat., 270), contestant....	138, 409
August 4, 1892 (27 Stat., 848), timber and stone.....	201, 264, 401, 408
December 20, 1892 (27 Stat., 1049), San Gabriel Forest Reserve.....	405
February 14, 1893 (27 Stat., 1059), Sierra Forest Reserve.....	80
February 21, 1893 (27 Stat., 470), private claim.....	323, 325
March 3, 1893 (27 Stat., 572, 592), surveys.....	386
March 3, 1893 (27 Stat., 612), sec. 10, Cherokee Outlet.....	49, 163
October 20, 1893 (28 Stat., 3), Oklahoma lands.....	50
May 4, 1894 (28 Stat., 71), Oklahoma lands.....	269
August 15, 1894 (28 Stat., 286), sec. 12, Sioux lands.....	250
August 18, 1894 (28 Stat., 372, 397), sec. 1, soldiers' additional.....	217
Sec. 4, desert lands.....	149, 228

	Page.
August 20, 1894 (28 Stat., 423), survey of granted lands.....	77
August 23, 1894 (28 Stat., 491), abandoned military reservation.....	115, 193
December 13, 1894 (28 Stat., 594), certificate of location.....	224
January 21, 1895 (28 Stat., 635), right of way.....	13, 17
February 26, 1895 (28 Stat., 683), mineral lands.....	395
February 26, 1895 (28 Stat., 687), isolated tract.....	201, 247
March 2, 1895 (28 Stat., 876, 894), Wichita lands.....	1
March 2, 1896 (29 Stat., 42), railroad lands.....	426
March 30, 1896 (29 Stat., 80), right of way.....	124
April 25, 1896 (29 Stat., 109), station grounds.....	124
May 14, 1896 (29 Stat., 120), right of way.....	13, 361
June 3, 1896 (29 Stat., 197), sec. 2, commutation of homestead.....	160
June 11, 1896 (29 Stat., 413, 434), desert land.....	229
January 13, 1897 (29 Stat., 484), reservoir sites.....	246
February 22, 1897 (29 Stat., 901), Olympic forest reserve.....	47, 186
February 22, 1897 (29 Stat., 902), Black Hills forest reserve.....	58
June 4, 1897 (30 Stat., 11, 35), timber cutting.....	414
June 4, 1897 (30 Stat., 11, 36), forest reserve.....	78,
152, 176, 185, 186, 213, 215, 220, 225, 251,	
252, 273, 289, 303, 312, 319, 322, 352, 372	
June 7, 1897 (30 Stat., 62, 90), timber on Indian reservation.....	315
May 11, 1898 (30 Stat., 404), sec. 1, right of way.....	13, 17
May 14, 1898 (30 Stat., 409), sec. 1, Alaskan homestead.....	442
June 16, 1898 (30 Stat., 473), military service of settler.....	170
June 21, 1898 (30 Stat., 484), sec. 1, New Mexico school grant.....	189, 390
Sec. 3, State institutions.....	189, 390
Sec. 8, New Mexico grant.....	263
June 28, 1898 (30 Stat., 495), Curtis Act....	42
July 1, 1898 (30 Stat., 597, 618), timber cutting.....	413
July 1, 1898 (30 Stat., 597, 620), Northern Pacific adjustment.....	130, 162, 255, 432
July 7, 1898 (30 Stat., 750), Hawaii.....	240, 282
September 19, 1898 (30 Stat., 1783), Black Hills forest reserve.....	58
March 2, 1899 (30 Stat., 990), right of way.....	39, 119
March 2, 1899 (30 Stat., 993), Pacific forest reserve.....	196, 198, 397
Sec. 3, relinquishment by railroad....	29
Sec. 4, unsurveyed land.....	398
March 3, 1899 (30 Stat., 1095), Black Hills forest reserve.....	58
March 31, 1899 (30 Stat., 1121), sec. 9, navigable streams.....	44
March 28, 1900 (31 Stat., 52), Fort Hays reservation.....	194

	Page.		Page.
April 7, 1900 (31 Stat., 1962), Olympic forest reserve.....	176, 253	March 1, 1901 (31 Stat., 847), soldiers' homestead.....	5, 108
April 30, 1900 (31 Stat., 141), sec. 55, Hawaii.....	249	March 1, 1901 (31 Stat., 861), Creek agreement.....	42
Sec. 73, Hawaii.....	241, 282	March 3, 1901 (31 Stat., 1037) forest reserve.....	372
May 17, 1900 (31 Stat., 179), free homesteads.....	73, 107, 163, 250, 358	March 3, 1901 (31 Stat., 1058, 1083), sec. 3, right of way.....	16
June 5, 1900 (31 Stat., 267), sec. 2, second homestead.....	46, 50, 445	March 3, 1901 (31 Stat., 1093), Kiowa, Comanche, Apache, and Wichita lands..	3, 84, 107, 126, 157
Sec. 3, second homestead.....	25	March 3, 1901 (31 Stat., 1133, 1188), sec. 3, desert land.....	229
June 6, 1900 (31 Stat., 588, 614), forest reserve.....	176, 185, 187, 221, 227, 289, 372	March 11, 1902 (32 Stat., 63), Oklahoma land.....	366
June 6, 1900 (31 Stat., 588, 615), mineral classification.....	396	March 11, 1902 (32 Stat., 63), amending section 2294, R. S.....	274, 286
June 6, 1900 (31 Stat., 672), Fort Hall Indian lands.....	147	April 15, 1902 (32 Stat., 106), settlers in forest reserves.....	331
June 6, 1900 (31 Stat., 672, 676), Comanche, Kiowa, and Apache lands..	1, 46, 84, 145, 154, 366	April 28, 1902 (32 Stat., 172), Louisiana Agricultural and Mechanical College.....	348
June 6, 1900 (31 Stat., 672, 679), Oklahoma land.....	362, 445	May 22, 1902 (32 Stat., 203), homestead commutation.....	358
January 4, 1901 (31 Stat., 727), Comanche, Kiowa, and Apache lands.....	3, 126	June 13, 1902 (32 Stat., 384), Ute Indian lands.....	388
January 31, 1901 (31 Stat., 745), saline land.....	390	June 17, 1902 (32 Stat., 388), secs. 3 and 4, irrigation act.....	420, 423
January 26, 1901 (31 Stat., 740), commutation of homesteads.....	73, 106, 250	July 1, 1902 (32 Stat., 657), Navajo Indian lands.....	381
January 31, 1901 (31 Stat., 745), saline lands.....	131	July 1, 1902 (32 Stat., 730), Umatilla Indian lands.....	392
February 15, 1901 (31 Stat., 790), right of way.....	13	July 1, 1902 (32 Stat., 733), railroad lands.....	425
February 18, 1901 (31 Stat., 794), corporations in Indian Territory.....	40		

REVISED STATUTES CITED AND CONSTRUED.

	Page.		Page.
Section 1.....	287	Section 2320.....	23
Section 441.....	300, 306, 348	Section 2321.....	157
Section 450.....	348	Section 2324.....	179
Section 451.....	348	Section 2325.....	23, 37, 66, 71, 89, 140, 157
Section 453.....	158, 300, 306, 348	Section 2326.....	89, 416
Section 458.....	348	Section 2327.....	66
Section 2238.....	75, 250	Section 2329.....	66
Sections 2264 to 2266.....	48	Section 2330.....	66
Section 2275.....	336	Section 2331.....	66
Section 2279.....	226	Section 2334.....	157
Section 2283.....	226	Section 2345.....	135
Section 2289.....	87, 146, 226, 321	Section 2347.....	30
Section 2291.....	358	Section 2357.....	199, 250, 251, 278
Section 2293.....	171	Sections 2380 to 2389.....	146
Section 2294.....	48, 274, 286	Section 2395.....	66, 78
Section 2301.....	47, 50, 358, 446	Section 2396.....	66
Section 2302.....	135	Section 2401.....	77
Section 2303.....	135, 136	Section 2403.....	77
Section 2304.....	5, 20, 27, 108, 166, 257, 350, 357, 428	Section 2414.....	223
Section 2305.....	166, 170, 428	Section 2415.....	223
Section 2306.....	20, 26, 104, 165, 226, 256, 320, 321, 350, 357, 428, 481, 442, 444	Section 2455.....	201, 247
Section 2307.....	19, 257, 350, 444	Section 2461.....	268
Section 2308.....	170	Section 2477.....	407
Section 2318.....	135	Section 2478.....	158, 300, 306, 348
Sections 2319 to 2352.....	135	Section 2488.....	305, 307, 309

RULES OF PRACTICE CITED AND CONSTRUED.

	Page.		Page.
Rule 21	68	Rule 53	160
Rule 23	68	Rule 100	318
Rule 24	68	Rule 102	56

DECISIONS
RELATING TO
THE PUBLIC LANDS.

OPENING OF KIOWA, COMANCHE, APACHE, AND WICHITA INDIAN
LANDS IN THE TERRITORY OF OKLAHOMA.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas, by an agreement between the Wichita and affiliated bands of Indians on the one part and certain commissioners of the United States on the other part, ratified by act of Congress approved March 2, 1895 (28 Stat., 876, 894), the said Indians ceded, conveyed, transferred, and relinquished, forever and absolutely, without any reservation whatever, unto the United States of America, all their claim, title, and interest of every kind and character in and to the lands embraced in the following described tract of country now in the Territory of Oklahoma, to wit:

Commencing at a point in the middle of the main channel of the Washita River, where the ninety-eighth meridian of west longitude crosses the same, thence up the middle of the main channel of said river to the line of $98^{\circ} 40'$ west longitude, thence on said line of $98^{\circ} 40'$ due north to the middle of the channel of the main Canadian River, thence down the middle of said main Canadian River to where it crosses the ninety-eighth meridian, thence due south to the place of beginning.

And whereas, in pursuance of said act of Congress ratifying said agreement, allotments of land in severalty have been regularly made to each and every member of said Wichita and affiliated bands of Indians, native and adopted, and the lands occupied by religious societies or other organizations for religious or educational work among the Indians have been regularly allotted and confirmed to such societies and organizations, respectively;

And whereas, by an agreement between the Comanche, Kiowa, and Apache tribes of Indians on the one part and certain commissioners of the United States on the other part, amended and ratified by act of Congress approved June 6, 1900 (31 Stat., 672, 676), the said Indian tribes, subject to certain conditions which have been duly performed, ceded, conveyed, transferred, relinquished, and surrendered, forever

and absolutely, without any reservation whatsoever, expressed or implied, unto the United States of America, all their claim, title, and interest of every kind and character in and to the lands embraced in the following described tract of country now in the Territory of Oklahoma, to wit:

Commencing at a point where the Washita River crosses the ninety-eighth meridian west from Greenwich; thence up the Washita River, in the middle of the main channel thereof, to a point thirty miles, by river, west of Fort Cobb, as now established; thence due west to the north fork of Red River, provided said line strikes said river east of the one-hundredth meridian of west longitude; if not, then only to said meridian line, and thence due south, on said meridian line, to the said north fork of Red River; thence down said north fork, in the middle of the main channel thereof, from the point where it may be first intersected by the lines above described, to the main Red River; thence down said Red River, in the middle of the main channel thereof, to its intersection with the ninety-eighth meridian of longitude west from Greenwich; thence north, on said meridian line, to the place of beginning.

And whereas, in pursuance of said act of Congress ratifying the agreement last named, allotments of land in severalty have been regularly made to each member of the said Comanche, Kiowa, and Apache tribes of Indians; the lands occupied by religious societies or other organizations for religious or educational work among the Indians have been regularly allotted and confirmed to such societies and organizations, respectively; and the Secretary of the Interior, out of the lands ceded by the agreement last named, has regularly selected and set aside, for the use in common for said Comanche, Kiowa, and Apache tribes of Indians, four hundred and eighty thousand acres of grazing lands;

And whereas, in the act of Congress ratifying the said Wichita agreement, it is provided:

That whenever any of the lands acquired by this agreement shall, by operation of law or proclamation of the President of the United States, be open to settlement, they shall be disposed of under the general provisions of the homestead and town-site laws of the United States: *Provided*, That in addition to the land-office fees prescribed by statute for such entries the entryman shall pay one dollar and twenty-five cents per acre for the land entered at the time of submitting his final proof: *And provided further*, That in all homestead entries where the entryman has resided upon and improved the land entered in good faith for the period of fourteen months, he may commute his entry to cash upon the payment of one dollar and twenty-five cents per acre: *And provided further*, That the rights of honorably discharged Union soldiers and sailors of the late civil war, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes shall not be abridged: *And provided further*, That any qualified entryman having lands adjoining the lands herein ceded, whose original entry embraced less than one hundred and sixty acres, may take sufficient land from said reservation to make his homestead entry not to exceed one hundred and sixty acres in all, said land to be taken upon the same conditions as are required of other entrymen: *Provided*, That said lands shall be opened to settlement within one year after said allotments are made to the Indians.

* * * * *

That the laws relating to the mineral lands of the United States are hereby extended over the lands ceded by the foregoing agreement.

And whereas in the act of Congress ratifying the said Comanche, Kiowa, and Apache agreement it is provided—

That the lands acquired by this agreement shall be opened to settlement by proclamation of the President within six months after allotments are made and be disposed of under the general provisions of the homestead and town-site laws of the United States: *Provided*, That in addition to the land-office fees prescribed by statute for such entries the entryman shall pay one dollar and twenty-five cents per acre for the land entered at the time of submitting his final proof: *And provided further*, That in all homestead entries where the entryman has resided upon and improved the land entered in good faith for the period of fourteen months he may commute his entry to cash upon the payment of one dollar and twenty-five cents per acre: *And provided further*, That the rights of honorably discharged Union soldiers and sailors of the late civil war, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, shall not be abridged: *And provided further*, That any person who, having attempted to but for any cause failed to secure a title in fee to a homestead under existing laws, or who made entry under what is known as the commuted provision of the homestead law, shall be qualified to make a homestead entry upon said lands: *And provided further*, That any qualified entryman having lands adjoining the lands herein ceded, whose original entry embraced less than one hundred and sixty acres in all, shall have the right to enter so much of the lands by this agreement ceded lying contiguous to his said entry as shall, with the land already entered, make in the aggregate one hundred and sixty acres, said land to be taken upon the same conditions as are required of other entrymen: *And provided further*, That the settlers who located on that part of said lands called and known as the "neutral strip" shall have preference right for thirty days on the lands upon which they have located and improved.

* * * * *

That should any of said lands allotted to said Indians, or opened to settlement under this act, contain valuable mineral deposits, such mineral deposits shall be open to location and entry, under the existing mining laws of the United States, upon the passage of this act, and the mineral laws of the United States are hereby extended over said lands.

And whereas, by the act of Congress approved January 4, 1901 (31 Stat., 727), the Secretary of the Interior was authorized to extend, for a period not exceeding eight months, from December 6, 1900, the time for making allotments to the Comanche, Kiowa, and Apache Indians and opening to settlement the lands so ceded by them;

And whereas, in pursuance of the act of Congress approved March 3, 1901 (31 Stat., 1093), the Secretary of the Interior has regularly subdivided the lands so as aforesaid respectively ceded to the United States by the Wichita and affiliated bands of Indians and the Comanche, Kiowa, and Apache tribes of Indians into counties, attaching portions thereof to adjoining counties in the Territory of Oklahoma, has regularly designated the place for the county seat of each new county, has regularly set aside and reserved at such county seat land for a town site to be disposed of in the manner provided by the act of Congress last named, and has regularly caused to be surveyed, subdivided, and platted the lands so set aside and reserved for disposition as such town sites.

And whereas, by the act of Congress last named it is provided—

The lands to be opened to settlement and entry under the acts of Congress ratifying said agreements, respectively, shall be so opened by proclamation of the President, and to avoid the contests and conflicting claims which have heretofore resulted from opening similar public lands to settlement and entry, the President's proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled thereto under the acts ratifying said agreements, respectively; and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation until after the expiration of sixty days from the time when the same are opened to settlement and entry.

And whereas by the act of Congress last named the President was authorized to establish two additional United States land districts and land offices in the Territory of Oklahoma, to include the land so ceded as aforesaid, which land districts and land offices have been established by an order of even date herewith;

And whereas all of the conditions required by law to be performed prior to the opening of said tracts of land to settlement and entry have been, as I hereby declare, duly performed;

Now, therefore, I, William McKinley, President of the United States of America, by virtue of the power vested in me by law, do hereby declare and make known that all of the lands so as aforesaid ceded by the Wichita and affiliated bands of Indians, and the Comanche, Kiowa, and Apache tribes of Indians, respectively, saving and excepting sections sixteen, thirty-six, thirteen, and thirty-three in each township, and all lands located or selected by the Territory of Oklahoma as indemnity school or educational lands, and saving and excepting all lands allotted in severalty to individual Indians, and saving and excepting all lands allotted and confirmed to religious societies and other organizations, and saving and excepting the lands selected and set aside as grazing lands for the use in common for said Comanche, Kiowa, and Apache tribes of Indians, and saving and excepting the lands set aside and reserved at each of said county seats for disposition as town sites, and saving and excepting the lands now used, occupied, or set apart for military, agency, school, school farm, religious, Indian cemetery, wood reserve, forest reserve, or other public uses, will, on the 6th day of August, 1901, at 9 o'clock a. m., in the manner herein prescribed and not otherwise, be opened to entry and settlement and to disposition under the general provisions of the homestead and townsite laws of the United States.

Commencing at 9 o'clock a. m., Wednesday, July 10, 1901, and ending at 6 o'clock p. m., Friday, July 26, 1901, a registration will be had at the United States land offices at El Reno and Lawton, in the Territory of Oklahoma (the office at Lawton to occupy provisional quarters in the immediate vicinity of Fort Sill, Oklahoma Territory, until suitable quarters can be provided at Lawton), for the purpose of ascertaining what persons desire to enter, settle upon, and acquire title to any of said

lands under the homestead law, and of ascertaining their qualifications so to do. The registration at each office will be for both land districts, but at the time of registration each applicant will be required to elect and state in which district he desires to make entry. To obtain registration each applicant will be required to show himself duly qualified to make homestead entry of these lands under existing laws and to give the registering officer such appropriate matters of description and identity as will protect the applicant and the government against any attempted impersonation. Registration can not be effected through the use of the mails or the employment of an agent, excepting that honorably discharged soldiers and sailors entitled to the benefits of section 2304 of the Revised Statutes of the United States, as amended by the act of Congress approved March 1, 1901 (31 Stat., 847), may present their applications for registration and due proofs of their qualifications through an agent of their own selection, but no person will be permitted to act as agent for more than one such soldier or sailor. No person will be permitted to register more than once or in any other than his true name. Each applicant who shows himself duly qualified will be registered and given a nontransferable certificate to that effect, which will entitle him to go upon and examine the lands to be opened hereunder in the land district in which he elects to make his entry; but the only purpose for which he may go upon and examine said lands is that of enabling him later on, as herein provided, to understandingly select the lands for which he will make entry. No one will be permitted to make settlement upon any of said lands in advance of the opening herein provided for, and during the first sixty days following said opening no one but registered applicants will be permitted to make homestead settlement upon any of said lands, and then only in pursuance of a homestead entry duly allowed by the local land officers, or of a soldier's declaratory statement duly accepted by such officers.

The order in which, during the first sixty days following the opening, the registered applicants will be permitted to make homestead entry of the lands opened hereunder, will be determined by drawings for both the El Reno and Lawton districts publicly held at the United States land office at El Reno, Oklahoma, commencing at 9 o'clock a. m., Monday, July 29, 1901, and continuing for such period as may be necessary to complete the same. The drawings will be had under the supervision and immediate observance of a committee of three persons whose integrity is such as to make their control of the drawing a guaranty of its fairness. The members of this committee will be appointed by the Secretary of the Interior, who will prescribe suitable compensation for their services. Preparatory to these drawings the registration officers will, at the time of registering each applicant who shows himself duly qualified, make out a card, which must be signed by the

applicant, stating the land district in which he desires to make homestead entry, and giving such a description of the applicant as will enable the local land officers to thereafter identify him. This card will be at once sealed in a separate envelope, which will bear no other distinguishing label or mark than such as may be necessary to show that it is to go into the drawing for the land district in which the applicant desires to make entry. These envelopes will be separated according to land districts and will be carefully preserved and remain sealed until opened in the course of the drawing as herein provided. When the registration is completed, all of these sealed envelopes will be brought together at the place of drawing and turned over to the committee in charge of the drawing, who, in such manner as in their judgment will be attended with entire fairness and equality of opportunity, shall proceed to draw out and open the separate envelopes and to give to each enclosed card a number in the order in which the envelope containing the same is drawn. While the drawings for the two districts will be separately conducted, they will occur as nearly at the same time as is practicable. The result of the drawing for each district will be certified by the committee to the officers of the district and will determine the order in which the applicants may make homestead entry of said lands and settlement thereon.

Notice of the drawings, stating the name of each applicant and number assigned to him by the drawing, will be posted each day at the place of drawing, and each applicant will be notified of his number by a postal card mailed to him at the address, if any, given by him at the time of registration. Each applicant should, however, in his own behalf, employ such measures as will insure his obtaining prompt and accurate information of the order in which his application for homestead entry can be presented as fixed by the drawing. Applications for homestead entry of said lands during the first sixty days following the opening can be made only by registered applicants and in the order established by the drawing. At each land office, commencing Tuesday, August 6, 1901, at 9 o'clock a. m., the applications of those drawing numbers 1 to 125, inclusive, for that district must be presented and will be considered in their numerical order during the first day, and the applications of those drawing numbers 125 to 250, inclusive, must be presented and will be considered in their numerical order during the second day, and so on at that rate until all of said lands subject to entry under the homestead law, and desired thereunder, have been entered. If any applicant fails to appear and present his application for entry when the number assigned to him by the drawing is reached, his right to enter will be passed until after the other applications assigned for that day have been disposed of, when he will be given another opportunity to make entry, failing in which he will be deemed to have abandoned his right to make entry

under such drawing. To obtain the allowance of a homestead entry, each applicant must personally present the certificate of registration theretofore issued to him, together with a regular homestead application and the necessary accompanying proofs, and with the regular land office fees, but an honorably discharged soldier or sailor may file his declaratory statement through the agent representing him at the registration. The production of the certificate of registration will be dispensed with only upon satisfactory proof of its loss or destruction. If at the time of considering his regular application for entry it appear that any applicant is disqualified from making homestead entry of these lands his application will be rejected, notwithstanding his prior registration. If any applicant shall register more than once hereunder, or in any other than his true name, or shall transfer his registration certificate, he will thereby lose all the benefits of the registration and drawing herein provided for, and will be precluded from entering or settling upon any of said lands during the first sixty days following said opening.

Because of the provision in the said act of Congress approved June 6, 1900, "that the settlers who located on that part of said lands called and known as the 'neutral strip' shall have preference right for thirty days on the lands upon which they have located and improved," the said lands in the "neutral strip" shall for the period of thirty days after said opening be subject to homestead entry and town-site entry only by those who have heretofore located upon and improved the same, and who are accorded a preference right of entry for thirty days as aforesaid. Persons entitled to make entry under this preference right will be permitted to do so at any time during said period of thirty days following the opening without previous registration and without regard to the drawing herein provided for, and at the expiration of that period the lands in said "neutral strip" for which no entry shall have been made will come under the general provisions of this proclamation.

The intended beneficiaries of the provision in the said acts of Congress, approved, respectively, March 2, 1895, and June 6, 1900, which authorizes a qualified entry man having lands adjoining the ceded lands, whose original entry embraced less than 160 acres, to enter so much of the ceded lands as will make his homestead entry contain in the aggregate not exceeding 160 acres, may obtain such an extension of his existing entry, without previous registration and without regard to the drawing herein provided for, only by making appropriate application, accompanied by the necessary proofs, at the proper new land office at some time prior to the opening herein provided for.

Any person or persons desiring to found, or to suggest establishing, a town site upon any of said ceded lands at any point not in the near vicinity of either of the county seats therein heretofore selected

and designated as aforesaid, may, at any time before the opening herein provided for, file in the proper local land office a written application to that effect, describing by legal subdivisions the lands intended to be affected, and stating fully and under oath the necessity or propriety of founding or establishing a town at that place. The local officers will forthwith transmit said petition to the Commissioner of the General Land Office with their recommendation in the premises. Such Commissioner, if he believes the public interests will be subserved thereby, will, if the Secretary of the Interior approve thereof, issue an order withdrawing the lands described in such petition, or any portion thereof, from homestead entry and settlement and directing that the same be held for the time being for town-site settlement, entry, and disposition only. In such event, the lands so withheld from homestead entry and settlement will, at the time of said opening and not before, become subject to settlement, entry, and disposition under the general town-site laws of the United States. None of said ceded lands will be subject to settlement, entry, or disposition under such general town-site laws except in the manner herein prescribed until after the expiration of sixty days from the time of said opening.

Attention is hereby especially called to the fact that under the special provisions of the said act of Congress approved March 3, 1901, the town sites selected and designated at the county seats of the new counties into which said lands have been formed can not be disposed of under the general town-site laws of the United States, and can only be disposed of in the special manner provided in said act of Congress, which declares:

The lands so set apart and designated shall, in advance of the opening, be surveyed, subdivided, and platted, under the direction of the Secretary of the Interior, into appropriate lots, blocks, streets, alleys, and sites for parks or public buildings, so as to make a town site thereof: *Provided*, That no person shall purchase more than one business and one residence lot. Such town lots shall be offered and sold at public auction to the highest bidder, under the direction of the Secretary of the Interior, at sales to be had at the opening and subsequent thereto.

All persons are especially admonished that under the said act of Congress approved March 3, 1901, it is provided that no person shall be permitted to settle upon, occupy, or enter any of said ceded lands except in the manner prescribed in this proclamation until after the expiration of sixty days from the time when the same are opened to settlement and entry. After the expiration of the said period of sixty days, but not before, any of said lands remaining undisposed of may be settled upon, occupied, and entered under the general provisions of the homestead and town-site laws of the United States in like manner as if the manner of effecting such settlement, occupancy, and entry had not been prescribed herein in obedience to law.

It appearing that there are fences around the pastures into which, for convenience, portions of the ceded lands have heretofore been

divided, and that these fences are of considerable value and are still the property of the Indian tribes ceding said lands to the United States, all persons going upon, examining, entering, or settling upon any of said lands are cautioned to respect such fences as the property of the Indians, and not to destroy, appropriate, or carry away the same, but to leave them undisturbed, so that they may be seasonably removed and preserved for the benefit of the Indians.

The Secretary of the Interior shall prescribe all needful rules and regulations necessary to carry into full effect the opening herein provided for.

In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this fourth day of July, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States the one hundred and twenty-sixth.

[SEAL.]

WILLIAM MCKINLEY.

By the President:

DAVID J. HILL,

Acting Secretary of State.

HOMESTEAD ENTRY IN WICHITA AND KIOWA, COMANCHE AND
APACHE CEDED LANDS—QUALIFICATIONS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., July 5, 1901.

The following persons are not qualified to make homestead entry in the Wichita and Kiowa, Comanche and Apache ceded lands:

1. Any person who has an existing homestead entry or who, after June 6, 1900, abandoned or relinquished such an entry.

2. A married woman, unless she has been deserted or abandoned by her husband.

3. One not a citizen of the United States, and who has not declared his intention to become such.

4. Any one under twenty-one years of age, not the head of a family, unless he served in the army or navy of the United States for not less than fourteen days during actual war.

5. Any one who is the proprietor of more than one hundred and sixty acres of land in any State or Territory.

6. One who has perfected title to a homestead of one hundred and sixty acres by proof of residence and cultivation for five years.

7. One who has perfected title to a homestead of one hundred and sixty acres under Section 2, act of June 15, 1880.

8. One who is in the situation where the title acquired and now being acquired by him under the public land laws, in pursuance of entries made since August 30, 1890, with the tract now sought to be entered will make in the aggregate more than three hundred and twenty acres of nonmineral land.

BINGER HERMANN,
Commissioner.

Approved:

E. A. HITCHCOCK,
Secretary.

DESERT LAND ENTRY—ANNUAL PROOF—CONTEST.

JULIAN v. HARDING.

A contest charging a desert land entryman with failure to make the requisite annual expenditure, thus putting in issue the truth of the yearly proof offered by the entryman, may be brought prior to the expiration of the time allowed for the submission of final proof.

The case of Andrew Clayburg, 20 L. D., 111, cited and distinguished.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *July 8, 1901.* (L. L. B.)

This is an appeal by the heirs of Gardner F. Harding from your office decision of July 12, 1900, holding for cancellation the desert land entry of said Harding, embracing lots 1 and 2, and the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$, Sec. 7, T. 14 S., R. 93 W., Montrose, Colorado, land district, containing approximately three hundred and twenty acres, constituting the north half of said section 7.

The entry was made August 12, 1895, and June 22, 1898, George Julian filed contest against said entry alleging, upon his information and belief, that the said entryman has wholly failed to make any material expenditures as required by law, that said tracts and no part thereof have been irrigated, reclaimed, or cultivated, as required by law, and that Harding had abandoned said tracts since making his entry. The affidavit was corroborated by two witnesses, also upon information and belief.

On the day named in the notice for the hearing (August 10, 1898) the contestant appeared, with his witnesses, and discovering that service of notice was defective, the hearing was postponed, for service, until November 19, 1898. It was afterwards, for the same purpose, continued to December 30, 1898, at which time the defendant appeared by counsel and moved to dismiss the contest, for the following reasons:

First: That the register and receiver are without jurisdiction to entertain this contest, for the reason that the records of the Montrose, Colorado, land office, disclose that the claimant had at the time this contest was filed fully complied with the laws relating to the annual expenditure in desert land entries, and the proof of the same,

and that therefore his entry was and still is incontestable. (See case of Andrew Clayburg, 20 L. D., 115.)

Second: That the affidavit of contest on file herein does not state facts sufficient to constitute a valid ground of contest.

Third: That the evidence of contestant and his witnesses does not establish a state of facts sufficient to justify the cancellation of the entry in controversy.

Fourth: That the evidence of contestant does not support and sustain the allegations of his affidavit of contest.

Fifth: That it appears from the records of the local land office that claimant's entry was made on August 12, 1895; that on August 19, 1896, yearly proof was transmitted to the Gen. L. O. May 5, 1897, yearly proof was transmitted to the Gen. L. O. August 10, 1897, 2d yearly proof (amended) was transmitted to the Gen. L. O., for the year ending Aug. 12, 1897. March 8, 1898, 3d yearly proof was transmitted to the Gen. L. O.; that it appears from the above notations that claimant has complied with his duties as to filing proofs of expenditure and that no contest can be legally initiated against his entry on the ground that he has not made the yearly expenditures required by law at this time.

The motion was denied, and the defendant not offering to submit any testimony in support of the entry, the local officers recommended the cancellation of the entry upon evidence theretofore submitted by the contestant by permission of the register and receiver.

The record does not disclose any objection by defendant as to the manner or time of submitting the testimony on the part of contestant, and it does not appear that any other objection was made to it, except as disclosed in the motion to dismiss—namely, that it was insufficient to justify cancellation of the entry.

After the proceedings in the local office and appeal to the General Land Office, to wit, July 23, 1899, the entryman died, and the appeal to the Department was taken and is being prosecuted by his heirs.

The specifications of error, condensed, are as follows: that it was error not to sustain motion to dismiss; that the evidence at the hearing is insufficient to overcome showing made by claimant's annual proof; that the evidence does not sustain the allegations of contest, and that it was error not to hold that the evidence of contestant and his witnesses "was incompetent, irrelevant, and immaterial."

The record discloses that prior to the initiation of the contest the claimant had submitted the three years' annual proof required by the statute, in which he testified, corroborated by two witnesses, that he had expended the first year \$340 in work on Overland Ditch, for conveying water to the land; the same amount and for the same purpose the second year; and \$325 the third year.

The evidence submitted at the hearing shows that there has been nothing done on the land by way of ditching, preparation for irrigating, fencing, or other improvement—in short, that the land is in the same condition that it was at the date of entry.

It further appears that the entryman had worked for the Overland Ditch Company in constructing the ditch intended to supply water for

this and other entries, but that he had been fully paid by the company for all work so done by him, amounting in all to about \$175. For this labor so performed and paid for, the entryman attempted to get credit in his three annual proofs for the yearly expenditures of a dollar per acre required by statute. His annual proofs were, of course, false and fraudulent, inasmuch as they allege an expenditure each year of at least \$320, when in fact there had been nothing expended by the entryman.

It is insisted by counsel for defendant that, under the law as announced in the case of Andrew Clayburg (20 L. D., 111), contests can not be brought against desert land entries until the expiration of the time allowed for making final proof; that the submission of the yearly proofs disclosing the required annual expenditures is a bar to the initiation of a contest prior to the submission of final proof. This means that, although, as in this case, such annual proofs are untrue, and the claimant has totally failed to comply with the law as to annual expenditure on the land, yet if he files each year evidence of such expenditure, he is protected against contests. In other words, even if he is in default as to actual compliance with the requirements of the statute, yet so long as he is willing to falsely testify that he is not in default, and can procure two other affiants to corroborate such testimony, his compliance with law can not be questioned within the time allowed for the submission of his final proof, until which time his entry must stand intact.

This contention can not receive departmental approval.

This question is well considered and discussed in your office decision, holding that the case of Andrew Clayburg has application to *ex parte* cases solely and can not be invoked as against a contestant. This construction is in harmony with the General Circular of 1899, wherein (page 43) it is said: "In *ex parte* cases the entryman's right to the land will not be passed upon until submission of final proof," in support of which statement the said Clayburg case is cited.

To hold that a contest putting in issue the truth of the yearly proof could not be brought within the time allowed for the submission of final proof, would be in violation of the plain letter of the statute.

Section 2 of the act of March 3, 1891, amending the desert-land act (26 Stat., 1095, 1097), in sub-section 7 provides—

that the claims or entries, made under this or any preceding act, shall be subject to contest as provided by the law relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled.

The yearly expenditure of one dollar per acre is a requirement of law, and the failure to do this is a "failure to comply with the requirements of law."

The decision appealed from is affirmed.

REGULATIONS CONCERNING RIGHT OF WAY OVER PUBLIC LANDS AND RESERVATIONS FOR TELEGRAPH AND TELEPHONE LINES, ELECTRICAL PLANTS, CANALS, RESERVOIRS, TRAMROADS, ETC.

CIRCULAR.

The following regulations are promulgated under the acts of Congress approved February 15, 1901 (31 Stat., 790), January 21, 1895 (28 Stat., 635), and section 1 of the act of May 11, 1898 (30 Stat., 404). The act of February 15, 1901, *supra*, entitled "An act relating to rights of way through certain parks, reservations, and other public lands," is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided*, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further*, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provisions of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

1. This act, in general terms, authorizes the Secretary of the Interior, under regulations to be fixed by him, to grant permission to use rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks in California, for every purpose contemplated by acts of January 21, 1895 (28 Stat., 635), May 14, 1896 (29 Stat., 120), and section 1 of the act of May 11, 1898 (30 Stat., 404), and for other purposes additional thereto, *except for tramroads, the provisions relating to tramroads, contained in the act of 1895 and in section 1 of the act of*

1898 aforesaid, remaining unmodified and not being in any manner extended.

Although this act does not expressly repeal any provision of law relating to the granting of permission to use rights of way, contained in the acts referred to, yet, considering the general scope and purpose of the act, and Congress having, with the exception above noted, embodied therein the main features of the former acts relative to the granting of a mere permission or license for such use, it is evident that, for purposes of administration, the later act should control in so far as the same pertains to the granting of permission to use rights of way for purposes therein specified. Accordingly all applications for *permission* to use rights of way for the purposes specified in this act must be submitted thereunder. Where, however, it is sought to acquire a right of way for the main purpose of irrigation and for public or other purposes as subsidiary thereto, as contemplated by sections 18 to 21 of the act of March 3, 1891 (26 Stat., 1095), and section 2 of the act of May 11, 1898, *supra*, the application must be submitted in accordance with the then existing regulations issued under said acts. (For present regulations, see 30 L. D., 325.)

2. It is to be specially noted that this act does not make a grant in the nature of an easement, but authorizes a mere permission in the nature of a license, revocable at any time, and it gives no right whatever to take from the public lands, reservations, or parks, adjacent to the right of way, any material, earth, or stone for construction or other purpose.

3. Application for permission to use the desired right of way through the public lands, reservations, and parks designated in the act must be filed and permission granted, as herein provided, before any rights can be claimed thereunder. Such application should be made in the form of a map and field notes, in duplicate, of the center line of the right of way or of the pipe, telegraph, telephone, or electrical line, canal, conduit, or reservoir, and must be filed in the local land office for the district in which the land traversed by the right of way is situate; if in more than one district, duplicate maps and field notes need be filed in only one district and single sets in the others. The maps, field notes, evidence of water rights, etc., and, when the applicant is a corporation, the articles of incorporation and proofs of organization, must be prepared and filed in accordance with the then existing regulations, under the general right-of-way acts (for present regulations under said acts see 27 L. D., 663, and 30 L. D., 325), appropriate changes being made in the prescribed forms so as to specify and relate to the act under which the application is made. Permission may be given under this act for rights of way upon unsurveyed lands, maps to be prepared in accordance with the requirements of the circulars noted.

4. An affidavit that the applicant is a citizen of the United States

must accompany the application, and if the applicant is an association of citizens, each must make affidavit of citizenship, and a complete list of the members thereof must be given in an affidavit by one of them; if not a native-born citizen, the applicant will be required to file the usual proofs of naturalization. The applicant must also set forth in the affidavit the purposes for which the right of way is to be used, and must show that he in good faith intends to utilize the same for such purposes in the event his application therefor is granted.

5. When application is made for right of way for electrical or water plants, the location and extent of ground proposed to be occupied by buildings or other structures necessary to be used in connection therewith must be clearly designated on the map and described in the field notes and forms by reference to course and distance from a corner of the public survey. In addition to being shown in connection with the main drawing, the buildings or other structures must be platted on the map in a separate drawing on a scale sufficiently large to show clearly their dimensions and relative positions. When two or more of such proposed structures are to be located near each other, it will be sufficient to give the reference to a corner of the public survey for one of them provided all the others are connected therewith by course and distance shown on the map. The applicant must also file an affidavit setting forth the dimensions and proposed use of each of the structures and must show definitely that each one is necessary to a proper use of the right of way for the purposes contemplated in the act.

6. Whenever a right of way is located upon a reservation, the applicant must file a certificate to the effect that the right of way is not so located as to interfere with the proper occupation of the reservation by the government, and, when located upon any of the national parks designated in the act, the applicant must show to the satisfaction of the Department that the location and use of the right of way for the purposes contemplated will not interfere with the uses and purposes for which the park was originally dedicated and will not result in damage or injury to the natural conditions of property or scenery existing therein. When the right of way is located on a forest or timber reserve or in any of the designated national parks, the applicant must file a stipulation under seal to take no timber whatever from such reservation or park outside of the right of way, and to remove no timber within the right of way except only such as is rendered necessary by the proper use and enjoyment of the privilege for which application is made. The applicant will also be required to give bond to the government of the United States, to be approved by the Commissioner of the General Land Office, conditioned to the effect that the makers thereof will pay the United States for any and all damage to the public lands, timber, natural curiosities, or other public property on such reservation or park or upon the public lands of the

United States by reason of such use and occupation of the reserve or park, regardless of the cause or circumstances under which such damage may occur. A bond furnished by any surety company that has complied with the provisions of the act of August 13, 1894 (28 Stat., 279), will be accepted if properly conditioned as aforesaid. The amount of the bond can not be fixed until the application has been submitted to the General Land Office, when a form of bond will be furnished and the amount thereof fixed.

7. Whenever right of way within a reservation or park is desired for operations in connection with mining, quarrying, cutting timber, or manufacturing lumber, a satisfactory showing must be made of the applicant's right to engage in such operations within the reserve or park.

8. Applications for right of way, under this act, all or any part of which crosses or is located upon any Indian reservation, before being transmitted to the Department will be submitted by the Commissioner of the General Land Office to the Office of Indian Affairs for such action and recommendation thereon as that office may deem proper in so far as the same pertains to such Indian reservation. Applicants will be required to furnish, in triplicate, so much of the map and field notes as relate to that portion of the right of way applied for, if any, within an Indian reservation; and in the event the application is subsequently granted, one copy of such portion of the map and field notes as pertains to such reservation will be placed on file in the Indian Office. In this connection, attention is directed to the provisions of section 3 of the act of March 3, 1901 (31 Stat., 1083), which authorizes the granting of permanent rights of way, in the nature of easements, for telegraph and telephone purposes only, through Indian reservations and other Indian lands upon payment of proper compensation for the benefit of the Indians interested therein. The provisions of the latter act and the nature and character of the rights authorized to be secured thereunder differ materially from the provisions contained in this act and the rights authorized to be conferred thereunder. Applicants, therefore, desiring to secure permanent rights of way through Indian reservations or other Indian lands for telegraph and telephone purposes will be required to submit their applications therefor under the act of March 3, 1901, *supra*, in accordance with the then current regulations issued thereunder. (For existing regulations under said act, see regulations approved March 26, 1901.)

9. All applications for the use of a right of way under this act, through any lands designated therein, for telegraph and telephone purposes, must be accompanied by an official statement from the Post Office Department showing that the applicant has complied with its regulations under title sixty-five of the Revised Statutes of the United States and amendments thereto.

10. Upon the filing of an application under this act, the register will

note the same in pencil on the tract books, opposite the tracts traversed, giving date of filing and name of applicant, and also indorse on each map the date of filing over his written signature. If it does not appear that some portion of the public lands, reservations, or parks designated in the act would be affected by the approval of such maps, they will be returned to the applicant with notice of that fact. If vacant public land or lands in any reservation or park so designated are affected by the proposed right of way, the register will so certify on the map and duplicate over his signature, and will promptly transmit the same to the General Land Office with report that the required notations have been made.

11. Upon receipt of applications for right of way by the General Land Office, the same will be examined and then submitted to the Secretary of the Interior with recommendation as to their approval. Permission to use rights of way through a reservation or any park designated in the act will only be granted upon approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest. If the application, and the showing made in support thereof, is satisfactory, the Secretary of the Interior will give the required permission in such form as may be deemed proper, according to the features of each case; and it is to be expressly understood, in accordance with the final proviso of the act, that any permission given thereunder may be modified or revoked by the Secretary or his successor, in his discretion, at any time, and shall not be held to confer any right, easement, or interest in, to, or over any public land, reservation, or park. The final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the Department, a revocation of the permission so far as it affects that tract, and any permission granted hereunder is also subject to such further and future regulations as may be adopted by the Department.

12. When permission to use the right of way applied for is given by the Secretary of the Interior, a copy of the original map will be sent to the local officers, who will mark upon the township plats the line of the right of way and will note in pencil, opposite each tract of public land affected, that such permission has been given, the date thereof, and a reference to the act.

TRAMROADS.

13. The Secretary of the Interior is authorized to permit the use of rights of way for tramroads through the public lands of the United States, not within the limits of any park, forest, military, or Indian reservation under the provisions of the act of Congress of January 21, 1895 (28 Stat., 635), as amended by section 1 of the act of May 11, 1898 (30 Stat., 404). The act of January 21, 1895, *supra*, entitled 6855—Vol. 31—01—2

"An act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes," is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of the right of way through the public lands of the United States, not within the limits of any park, forest, military or Indian reservation, for tramroads, canals or reservoirs to the extent of the ground occupied by the water of the canals and reservoirs and fifty feet on each side of the marginal limits thereof; or fifty feet on each side of the center line of the tramroad, by any citizen or any association of citizens of the United States engaged in the business of mining or quarrying or of cutting timber and manufacturing lumber.

This act was amended by section 1 of the act of May 11, 1898, *supra*, as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act entitled "An act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes," approved January twenty-first, eighteen hundred and ninety-five, be, and the same is hereby, amended by adding thereto the following:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way upon the public lands of the United States, not within limits of any park, forest, military, or Indian reservations, for tramways, canals, or reservoirs, to the extent of the ground occupied by the water of the canals and reservoirs, and fifty feet on each side of the marginal limits thereof, or fifty feet on each side of the center line of the tramroad, by any citizen or association of citizens of the United States, for the purposes of furnishing water for domestic, public, and other beneficial uses."

14. Applications for permission to use rights of way for tramroads should be prepared and filed in accordance with the regulations hereinbefore prescribed relative to presentation of applications for rights of way under the act of February 15, 1901, and the then current regulations issued under the general railroad right-of-way act of March 3, 1875 (for existing regulations under the latter act, see 27 L. D., 663), the prescribed forms in such regulations being so modified as to specify and relate to the acts under which the application is made. It is to be specially noted that the acts relating to tramroads do not authorize the granting of permission to use rights of way for such purpose within the limits of any park, forest, military, or Indian reservation, and it is to be further noted that permission to use rights of way for tramroads over public lands, when granted, only confers a right in the nature of a license and is subject to all the conditions and limitations hereinbefore stated in paragraph 11 of these regulations.

BINGER HERMANN,
Commissioner.

Approved, July 8, 1901:

E. A. HITCHCOCK,
Secretary.

SOLDIERS' ADDITIONAL HOMESTEAD—RIGHT OF WIDOW.

WILLIAM DEARY.

The wife of an insane soldier, who makes homestead entry, as the head of a family, for less than one hundred and sixty acres of land, is not, upon the death of the soldier, entitled, as his widow, to a soldiers' additional homestead right based upon such entry.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) July 12, 1901. (G. B. G.)

This is a motion filed by William Deary, assignee of the claimed soldiers' additional homestead right of Mary A. Meadow, widow of Samuel Meadow, for a review of departmental decision of May 6, 1901 (unreported), rejecting the application of said Deary to enter, under section 2306 of the Revised Statutes, the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 12, T. 65 N., R. 26 W., Duluth land district, Minnesota.

It appears from the papers accompanying the motion, and from the files of your office, that the said Samuel Meadow was a soldier in the service of the army of the United States for more than ninety days during the war of the rebellion, and that he was honorably discharged from such service August 23, 1865. September 10, 1869, the said Mary A. Meadow, wife of the soldier aforesaid, made homestead entry at the Clarksville land office, Arkansas, for eighty acres of land in that land district, upon which she made final proof January 14, 1876, and patent issued to her thereon June 30, 1876. This entry was made by the said Mary A. Meadow, in her own name, as the head of a family, and for her own use and benefit, no mention being made, either in the original application or in the final proof, that she was the wife of Samuel Meadow, or that she was a married woman. It appears from affidavits on file in connection with this proceeding that at the date of said entry Samuel Meadow was of unsound mind and had wandered away from home; but it is not shown or alleged that he had been declared to be of unsound mind by a competent tribunal, or that any judicial inquiry was ever held with reference to his mental condition. He died July 13, 1875, and your office reports that he had never exercised the homestead privilege.

The decision under review denies the application of Deary on the ground that the entry made by the said Mary A. Meadow does not constitute a proper legal basis for the right claimed.

In the motion for review it is contended, in substance, that Samuel Meadow being of unsound mind was legally dead, that his wife was, under the provisions of section 2307 of the Revised Statutes, entitled to all the benefits enumerated in chapter 5 of such statutes relating to homesteads, among which was the privilege conferred upon honorably

discharged soldiers by section 2304, and that she having made a homestead entry for only eighty acres of land, it should be held that she was entitled to a soldiers' additional right for eighty other acres of land, in accordance with the provisions of section 2306. This contention is open to many objections. Section 2304 provides that every private soldier or officer who served for ninety days in the army of the United States during the war of the rebellion, and who was honorably discharged, shall "be entitled to enter upon and receive patents for a quantity of public lands not exceeding one hundred and sixty acres." Section 2306 provides that every person entitled to enter a homestead under the provisions of section 2304, and who may have theretofore (prior to June 22, 1874) entered under the homestead laws a quantity of land less than one hundred and sixty acres, "shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres," and section 2307 provides that "in case of the death of any person who would be entitled to a homestead under the provisions of section 2304 his widow, if unmarried, . . . shall be entitled to all the benefits enumerated in this chapter."

The scheme presented by these three sections of the Revised Statutes is not a complicated one. The homestead privilege conferred on honorably discharged soldiers by section 2304 is no greater or different, so far as the amount of land that may be taken thereunder is concerned, than that conferred by section 2289 on all persons possessing the necessary qualifications. But section 2306 confers what is known as the soldiers' additional homestead right. This additional right is conditioned upon a previous entry by the soldier for less than one hundred and sixty acres of land, and the measure of the right is the difference between the amount of land previously entered and one hundred and sixty acres. These two sections present a complete scheme in themselves during the lifetime of the soldier. It is not until the soldier dies that section 2307 has any office to perform. Then his widow, if unmarried, may exercise such right as the soldier had. But if the soldier had not previous to his death made an entry under the homestead laws, he did not have an additional right, and in denying to his widow a right which the soldier himself did not possess is not to deny her any benefit enumerated in the chapter on homesteads. This does not, however, meet movant's contention that the soldier being legally dead, and his wife as the head of a family having prior to the adoption of the Revised Statutes entered a homestead of less than one hundred and sixty acres, she is entitled to the right conferred by section 2306, instead of the soldier. This contention cannot be admitted. The additional homestead right is conferred on the soldier himself, except in case of his "death," and in that event on his

"widow." This does not mean a civil death. The wife of a man *civiliter mortuus* is not his widow.

The Department would not be justified in holding on the present record that Samuel Meadow was civilly dead, or that he was not entitled to make an entry under the homestead laws, but if he was competent to make an entry he did not do so, and this would be fatal to the widow's claim.

Mary A. Meadow did not have a soldiers' additional homestead right, and her assignee took nothing by the assignment.

The motion is denied.

MINING CLAIM—VEIN OR LODE—SURFACE GROUND.

LELLIE LODE MINING CLAIM.

There is no authority in the mining laws for the issue of two patents for the same mineral land, the patent to one claimant to embrace only the surface land and the patent to another to embrace only the veins or lodes beneath the surface; nor is it within the contemplation of said laws that vein or lode deposits may be claimed, located, and patented independently of the surface ground connected with and containing or overlying them.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *July 15, 1901.* (A. B. P.)

August 20, 1900, The Red Rover Mining Company made entry, No. 643, for the Lellie lode mining claim, survey No. 12,677, Gunnison land district, Colorado.

October 13, 1900, there was received at your office a communication (forwarded through the local land office) from the Ocean Wave Mining and Reduction Company, which is in the nature of a protest against the issuance of an unconditional patent upon said entry.

It appears that the protestant company is the owner of the Wave of the Ocean lode mining claim, survey No. 93, in said land district, for which entry was made January 18, 1877, and patent issued May 6, 1881; that the Lellie claim was formerly known as the Red Rover, and between it and the Wave of the Ocean there was a conflict to the extent of 1.12 acres of ground; that by the Wave of the Ocean survey, entry, and patent said conflict was excluded in favor of the Red Rover claim; and that the Lellie claim as surveyed and entered is a relocation of the Red Rover, upon the identical original lines thereof.

The field notes of the Wave of the Ocean survey describe that claim as containing 9.21 acres, "after deducting surface ground claimed by Red Rover lode, 1.12 acres." The receiver's receipt and register's certificate of entry both show that the parties who made the entry paid only for 9.21 acres of land. The patent, after referring to the claim

by its survey or lot number (93), describes it by metes and bounds, and as—

Containing nine (9) acres and twenty-one hundredth ($21/100$) of an acre of land more or less and embracing fifteen hundred (1500) linear feet of the Wave of the Ocean lode.

In the granting clause of the patent the claim is described in these terms:

the said mining premises hereinbefore described as lot No. 93, embracing a portion of the unsurveyed public domain with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of fifteen hundred (1500) linear feet of the said Wave of the Ocean vein, lode, ledge or deposit, for the length hereinbefore described, throughout its entire depth, although it may enter the land adjoining; and also of all other veins, lodes, ledges or deposits throughout their entire depth, the tops or apexes of which lie inside the exterior lines of said survey, at the surface extended downward, vertically, although such veins, lodes, ledges or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey: Provided that the right of possession hereby granted to such outside parts of said veins, lodes, ledges or deposits, shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey, at the surface so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges or deposits, excepting and excluding, however, from these presents, all that portion of the surface ground herein described, which is embraced by said Red Rover lode.

It is contended by the protestant company that the effect of the exception from said patent was and is to exclude from the Wave of the Ocean claim only the surface area of the conflict with the Red Rover, now the Lellie claim; that said company, as the owner of the Wave of the Ocean claim, is entitled, under said patent, to the Wave of the Ocean vein or lode, throughout its entire depth, etc., for the full length of 1500 feet, notwithstanding the fact that the top or apex of such vein or lode lies partly within the surface lines, extended downward vertically, of the excluded conflict; and is likewise entitled to all veins or lodes, throughout their entire depth, etc., the tops or apexes of which lie inside the surface lines, extended downward vertically, of said Wave of the Ocean claim, inclusive of the excluded conflict. Upon this contention it is asked that the patent for the Lellie claim, when issued, shall in express terms except and exclude therefrom all right to any portion of the Wave of the Ocean vein or lode, and all right to any other veins, lodes, or ledges, the tops or apexes of which lie inside the surface lines, extended downward vertically, of the conflict excluded from the Wave of the Ocean patent.

By decision of December 10, 1900, your office held, in effect, that the Red Rover company is entitled to a patent upon its entry, without exception or qualification as to any claimed rights under the Wave of the Ocean patent within the ground excluded from that patent, and dismissed the protest. The protestant company thereupon appealed.

The errors assigned in the appeal present the single question of the effect of the Wave of the Ocean patent and of the exception therefrom of the conflict with the Red Rover claim. Does the exception exclude from the patent the surface of the conflict only, or is the effect of the exception to carve out of the grant by the patent all veins or lodes beneath the surface, the tops or apexes of which lie inside the vertical lines of the conflict, as well as the surface of the conflict?

There is no provision in the mining laws which authorizes the issue of two patents for the same mineral land, the patent to one claimant to embrace only the surface of the land, and the patent to the other to embrace only the veins or lodes beneath the surface. It is not within the contemplation of the mining statutes that vein or lode deposits may be claimed, located, and patented independently of the surface ground connected with and containing or overlying them.

Section 2320 of the Revised Statutes provides that mining claims upon veins or lodes, located after May 10, 1872, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; and that no claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor be limited to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on May 10, 1872, render such limitation necessary. The Wave of the Ocean claim was located after May 10, 1872. There is in the record no suggestion of adverse rights existing on May 10, 1872.

By section 2325 of the Revised Statutes provision is made for obtaining a patent from the government for land claimed and located for valuable mineral deposits. That section is in part as follows:

A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following:

It is to be observed that in the sections referred to no authority is given for the location of, or for the issue of patent to, veins or lodes of mineral, independently of the land in which they are found. Section 2320 prescribes the maximum length of a vein or lode that may be embraced in a location, prescribes the extent to which land may be taken in connection with the vein or lode on each side thereof, and

declares that, with the exception stated, such land shall not be limited to less than twenty-five feet in extent on each side of the middle of the vein at the surface. Section 2325 provides that a patent may be obtained "for any land claimed and located for valuable deposits" by any person, association, or corporation, "having claimed and located a piece of land for such purpose, who has, or have, complied with the terms of this chapter," etc. There is no provision for obtaining patent to veins or lodes otherwise than in connection with the land in which they are situated.

In the case of *Montana Ore-Purchasing Company v. Boston and Montana Consolidated Copper and Silver Mining Company* (51 Pac. Rep., 159) the precise question here presented was considered and decided by the supreme court of Montana. By the patent involved in that case it was attempted to convey the vein or lode on its strike through a portion of the claim as located, but which was excluded from the patent on account of conflict with another location. It was held that the patent, in so far as it was attempted thereby to convey the vein or lode on its strike outside and independently of the granted surface, was void. In the course of its opinion the court said:

While it is true that the surface of mining ground is often spoken of in the decisions of the courts as an incident to the vein whose apex lies within or under it, we are clearly of the opinion that the mining statutes of the United States contain no authority for the conveyance of the lodes or veins embraced in a located quartz claim independently of the surface ground connected with and containing or overlying them. Neither is the subject of patented grant by itself. Appellant calls to our attention various expressions, occurring in different sections of the United States mineral land statutes, for the purpose of showing that the surface is not regarded as an essential incident of the lode or vein in or below it. It is no doubt true that those statutes, taken as a whole, give greater prominence verbally to the lode or vein than to the surface connected therewith; but this naturally results from the fact that the lode is the main subject treated. Such expressions and such prominence, however, cannot avail to permit the grant of lodes or veins embraced in a located quartz claim regardless of the surface connected therewith.

See also *Lindley on Mines*, Vol. 1, Secs. 58-60, and Vol. 2, Sec. 780.

In view of what has been said, and upon careful consideration of the subject, the Department is of the opinion that the protestant company is not entitled, under the *Wave of the Ocean* patent, to any vein or lode the top or apex of which lies outside the vertical lines of the surface ground conveyed by the patent; that the effect of the exception from the patent of the *Red Rover* conflict was to carve out of the grant by the patent not only the surface area embraced in the conflict, but also all veins or lodes beneath such surface having their tops or apexes within the vertical lines thereof. It follows that said company is not entitled to the relief sought, and the decision of your office dismissing its protest is accordingly affirmed.

HOMESTEAD ENTRY—ACT OF JUNE 5, 1900.

SAMUEL F. HONEYCUTT.

A homestead entryman who failed to perfect title under his entry, and thereafter made a second entry under the act of March 2, 1889, which second entry was also not perfected, but "lost or forfeited," was by the act of June 5, 1900, restored to the status of a qualified homestead claimant and became entitled to the benefits of the homestead laws as though the second entry had not been made.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W.V. D.) *July 15, 1901.* (C. J. G.)

October 18, 1900, Samuel F. Honeycutt made homestead entry, under section 3 of the act of June 5, 1900 (31 Stat., 267), for the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 17, T. 20 N., R. 19 W., Harrison, Arkansas, land district.

April 20, 1901, your office held said entry for cancellation on the ground that said act of June 5, 1900, does not provide for a third privilege, it appearing that Honeycutt had previously made two homestead entries as follows: January 24, 1878, for the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 17, T. 20 N., R. 19 W.—canceled upon relinquishment January 16, 1879; and January 13, 1891, under section 2 of the act of March 2, 1889 (25 Stat., 854), for the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 4, and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 9, T. 17 N., R. 16 W.—canceled upon relinquishment April 21, 1898.

The case is here on appeal.

Said section 3 of the act of June 5, 1900, *supra*, provides:

That any person who prior to the passage of this act has made entry under the homestead laws, but from any cause has lost or forfeited the same shall be entitled to the benefits of the homestead laws as though such former entry had not been made.

The act deals with the status of the applicant under the homestead laws at the date of its passage, and the inquiry raised by an application under said act is whether the applicant is a person who prior to the passage thereof has made an entry under the homestead laws which from any cause he has lost or forfeited. If he is found to be such a person then he is "entitled to the benefits of the homestead laws as though such former entry had not been made."

The applicant herein originally made entry under the homestead laws but failed to perfect title thereunder. By the provisions of the second section of the act of March 2, 1889, *supra*, being a "person who has not heretofore perfected title to a tract of land of which he has made entry under the homestead law," he was entitled to make another entry, "such previous filing or entry to the contrary notwithstanding." The entry originally made, but not perfected, was, under

the act of March 2, 1889, to be regarded as never having been made so far as the rights of the applicant are concerned. The same is true, since the passage of the act of June 5, 1900, *supra*, of the entry made under the act of March 2, 1889, which was also not perfected but "lost or forfeited." So that if at the time of making that entry the applicant was rightfully entitled to make the same under the homestead laws, and the fact that the entry was allowed indicates that he was so entitled, he was by the act of June 5, 1900, restored to the status of a qualified homestead claimant and became entitled to the benefits of the homestead laws as though the last named entry had not been made.

The judgment of your office is reversed and Honeycutt's entry will be held intact subject to compliance with law.

SOLDIERS' ADDITIONAL HOMESTEAD.

ROYAL B. SHUTE.

A soldier entitled to the benefits of section 2306 of the Revised Statutes does not by the making of an invalid adjoining farm entry, as additional to his original homestead entry, lose his right to an additional entry under said section.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *July 15, 1901.* (G. B. G.)

This is the appeal of Royal B. Shute, remote assignee of the claimed soldiers' additional right of Creed H. Caldwell, from your office decision of March 30, 1901, denying the application of the said Shute to enter, as such assignee, under section 2306 of the Revised Statutes, the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 24, T. 150 N., R. 32 W., Crookston land district, Minnesota.

It appears from the files of your office that the said Caldwell on February 28, 1868, made homestead entry for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 2, T. 7 S., R. 11 W., Little Rock land district, Arkansas, containing 84.38 acres. This entry was allowed subject to the provisions of the act of June 21, 1866 (14 Stat., 66), restricting homestead entries in the State of Arkansas for the period of two years from the date of the act, to eighty acres of land. At the time of making the entry Caldwell paid cash for the 4.38 acres of land in excess of the 80 acres allowed by said act. March 3, 1869, he made application to enter an additional tract of land containing 80.26 acres adjoining the land embraced in his original entry. This second entry was allowed, apparently as an adjoining farm entry under the proviso to section one of the act of May 20, 1862 (12 Stat., 392), which declares "that any person owning and residing on land may, under the provisions of this act, enter other land lying contiguous to his or her said land, which shall

not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres."

In the year 1875 your office, after due notice, canceled the entry of February 28, 1868, for failure to submit final proof within the time required by law, and in 1879 canceled the entry of March 16, 1869, as per Caldwell's relinquishment to the United States of his claim to the land embraced in said entry.

January 29, 1900, the local officers transmitted to your office the aforesaid application of Shute, which was denied, as above stated, on the ground that Caldwell having made homestead entry for one hundred and sixty acres of land he is not entitled to an additional right under section 2306 of the Revised Statutes.

The decision appealed from is not believed to be correct. Caldwell has exhausted his homestead right only to the extent of 80 acres of land. The adjoining farm entry, made in 1869, was wholly unauthorized. He was not the owner of the contiguous land in the sense contemplated by the act of May 20, 1862, *supra*. Clearly an adjoining farm entry is not authorized when the application is based upon a pending original homestead entry of an adjoining tract. Caldwell's entry of 1869 was, therefore, a nullity. He could never have perfected title thereto, and it is not material for what reason it was canceled. Such an entry does not impair the homestead right.

If Caldwell served in the army of the United States for ninety days during the war of the rebellion and was honorably discharged, he was entitled under section 2304 of the Revised Statutes to enter upon and receive patent for a quantity of public land not to exceed one hundred and sixty acres or one-quarter section, and while the abandonment of his original entry exhausted his right to the extent of the acreage covered thereby, he was still entitled to enter 80 acres of land and this right could not be impaired by making an entry that could not be perfected.

Section 2306 of the Revised Statutes provides—

Every person entitled, under the provisions of section twenty-three hundred and four, to enter a homestead, who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres.

Inasmuch as Caldwell had prior to the adoption of the Revised Statutes entered a quantity of land less than one hundred and sixty acres, his assignee is entitled to exercise the right of entry conferred on him by section 2306 above quoted.

The decision appealed from is reversed, with directions to allow the entry of Shute unless other objection appears.

FOREST RESERVE—LIEU SELECTION—RELINQUISHMENT.

F. A. HYDE.

The relinquishment of lands selected in lieu of lands within the limits of a forest reserve, on the ground that the lands in the township wherein the selected lands are situated have been suspended from disposal pending an investigation to determine whether the same were mineral in character, will not be accepted, where it appears that the investigation has been concluded and the lands found to be of the character and condition subject to such selection.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *July 15, 1901.* (E. B., Jr.)

F. A. Hyde has appealed from the decision of your office dated March 26, 1901, declining to accept his relinquishment of all claim to the fractional NW. $\frac{1}{4}$ of Sec. 2, T. 27 S., R. 28 E., M. D. M., Visalia, California, land district, embraced in his forest reserve lieu selection No. 2070, filed January 3, 1900.

It appears that the public lands in said township were suspended by your office February 28, 1900, from disposition for the purpose of an investigation to determine whether the same were mineral in character, which suspension still continues as to the tract embraced in said section. In an affidavit filed with his said relinquishment Hyde states that the relinquishment is made because the said "township has been suspended" by your office, causing delay in the adjudication of his selection; that he supposed when he made the selection that the same would be approved without delay; that as the time when the same will be approved is indefinite and action may not be had on the selection for years he "does not desire to prosecute his claim or defend the same against probable or possible mineral claimants, as he is informed and believes that the land has been located for oil purposes;" that "he has neither sold nor conveyed the title to the land, nor made any contract to do so;" and that so far as he knows the land is in the same condition in which it has always been. It does not appear that any contest has been commenced or other objection entered against the said selection.

The decision of your office holds, in effect, that the said suspension of February 28, 1900, for the purpose stated, was made in the proper exercise of its authority and that no sufficient reason appears for accepting the said relinquishment. Mr. Hyde contends that he has shown sufficient reason for an acceptance of the relinquishment, stating in his argument on appeal, in addition to what he had previously stated, that he has missed the sale of the land by the delay of your office to act upon his selection.

The attempted relinquishment of said selection was evidently made by Mr. Hyde with a view to the making of another, and probably in

his estimation a more advantageous, selection in lieu of the forest reserve land which he has conveyed to the government as the basis therefor. And it appears from the records in your office that without waiting for action by your office upon his relinquishment he did, on March 12, 1901, file forest reserve lieu selection No. 4234 for certain other tracts based upon his conveyance to the government of the same land he had used as the basis for his previous selection No. 2070. Such selection No. 4234 should at once be rejected if that has not already been done.

It appears that an investigation as to the character and condition of the land embraced in said selection No. 2070 was made by a special agent of your office, as shown by his report dated February 21, 1901, and filed in your office March 1, 1901. According to the report of the special agent the land is of a character and condition subject to such selection. Unless, therefore, there be objection disclosed by the records of your office not disclosed by the record before the Department, you will proceed promptly to adjudicate such selection.

The decision of your office is affirmed.

FOREST RESERVE—COAL LANDS—SEC. 3, ACT OF MARCH 2, 1899.

BROWN v. NORTHERN PACIFIC RY. CO.

The Northern Pacific Railway Company is not authorized to select coal lands in lieu of lands relinquished under section three of the act of March 2, 1899.

Coal lands are mineral lands within the meaning, generally, of the laws relating to the public lands.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *July 16, 1901.* (E. B., Jr.)

The Northern Pacific Railway Company, hereinafter called also the company, has appealed from the decision of your office dated February 13, 1901, requiring it either to show cause, within sixty days from notice, why its selection, list No. 50, for the E. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of section 22, T. 16 N., R. 6 E., W. M., Olympia, Washington, land district, in lieu of what will be when surveyed the SW. $\frac{1}{4}$ of section 7, T. 16 N., R. 12 E., W. M., should not be rejected, or to appeal from such decision, upon pain of rejection of the selection in the event of default. The tract last described and used as the basis for the selection, is within the primary limits of the company's grant and also within the boundaries of the Pacific Forest Reserve.

The company filed its said selection September 20, 1900, under section 3 of the act of March 2, 1899 (30 Stat., 994), which reads:

That upon execution and filing with the Secretary of the Interior, by the Northern Pacific Railroad Company, of proper deed releasing and conveying to the United

States the lands in the reservation hereby created, also the lands in the Pacific Forest Reserve which have been heretofore granted by the United States to said company, whether surveyed or unsurveyed, and which lie opposite said company's constructed road, said company is hereby authorized to select an equal quantity of nonmineral public lands, so classified as nonmineral at the time of actual government survey, which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection, lying within any State into or through which the railroad of said Northern Pacific Railroad Company runs, to the extent of the lands so relinquished and released to the United States: *Provided*, That any settlers on lands in said national park may relinquish their rights thereto and take other public lands in lieu thereof, to the same extent and under the same limitations and conditions as are provided by law for forest reserves and national parks.

A properly executed deed releasing and conveying to the United States the lands described in said section 3 having been filed July 25, 1899, by the Northern Pacific Railway, successor in interest to the Northern Pacific Railroad Company, the Department accepted the same July 26, 1899, and thereupon declared the company to be authorized to select lieu lands as provided in that section.

October 29, 1900, Ulfers Brown filed an application to purchase, as coal land, under section 2347 of the Revised Statutes, the land selected by the company, which application was rejected the same day by the local officers because of its prior selection by the company. Brown appealed from the adverse action of the local office, contending that the land in controversy is coal land and, as such, not subject to selection by the company under said section 3, and that therefore his application should not have been rejected. Your said office decision affirms the rejection of Brown's application because of the appropriation of the land upon the records of the local office by the company's selection, but also finds that the government survey of the land classified it as coal land, which is held to be, in effect, a classification thereof as mineral land, and that therefore it was not subject to the company's selection, and, as already stated, required the company to show cause or to appeal.

The company contends (1) that the land selected was not classified as coal land at the time of survey, and (2) that even if it be found that it was classified as coal land such classification did not amount to a classification of the land as mineral within the meaning of said section.

The township in which the tract selected by the company is situated was surveyed in the field in 1883, and the survey thereof approved February 18, 1884. In the field notes of the survey of the south and east boundaries of the township, the township is described as—

all mountainous, rough and broken. It is one immense coal field and is valuable for that article as well as its timber, which is very fine and dense.

In the field notes of the survey of the subdivisional lines of the township the following description is given:

This township is a high, mountainous country from 2000 to 4000 feet above tide water; is densely timbered with fir, hemlock, cedar and some pine, with undergrowth of young fir, hemlock, huckleberry, vine maple and some salal.

There is but little if any agricultural land in the township; it is only valuable as mineral and timber land.

An especial feature is the many indications (croppings and float) of coal, which are found in every section in the whole township.

These descriptions from the approved field notes clearly constitute a return or classification by the surveyor general of the entire township, and each legal subdivision thereof, as coal land. It is quite evident that the term "mineral" used in the second description is intended to refer to the only mineral specifically mentioned in the field notes, that is, coal. It does not, so far as this case is concerned, in any measure affect the force of the mineral or coal return that the township is also returned as valuable timber land. The two returns are not incompatible. Valuable coal measures are very frequently found in land which produces also valuable timber. It is not necessary here to institute any inquiry as to the comparative values of the coal and the timber. It is enough upon the question as to the classification of the land that it is returned as valuable for coal. That coal lands are by authority of Congress classed as mineral lands, see the case of *T. P. Crowder* (30 L. D., 92, 95), and the cases there cited.

While in effect conceding that within the meaning, generally, of the laws relating to the public lands, coal lands are classed as mineral lands, the second contention of the company is that inasmuch as the original grant to the company's predecessor in interest (act July 2, 1864, section 3, 13 Stat., 365, 368), in excluding mineral lands "from the operations" thereof, provided that the word "mineral" therein should not be held "to include iron or coal," a similar limitation, at least so far as coal is concerned, is to be regarded as existing in section 3 of the said act of 1899.

This contention the Department does not believe to be sound. The act of 1899 is not dependent in its operation in any manner upon the act of 1864 beyond the mere reference to the latter act to determine what lands were embraced in that grant. The act of 1899 recognizes the grant by the act of 1864 as a thing complete and settled. It proposes an exchange of public lands for the company's granted lands within the Pacific Forest Reserve, and in the reservation thereby created, that is, the Mt. Ranier National Park. The terms and conditions of this exchange are completely expressed in the act providing therefor. It is unnecessary to resort to any other legislation for the meaning thereof. Upon the due release and conveyance of the described granted lands to the United States the company is authorized—

to select an equal quantity of nonmineral public lands, so classified as nonmineral at the time of actual government survey, etc.

These selections are authorized to be made "within any State into or through which the railroad of said Northern Pacific Railroad Company runs," instead of being confined within the much narrower limits prescribed by the granting act of 1864 for indemnity selections thereunder. The selections authorized by the act of 1899 are not indemnity selections in any proper sense but are lands received in exchange for lands surrendered and reconveyed to the United States. If the company's contention is sound it is authorized to search throughout the State into or through which its railroad runs and select public iron and coal land only, if the same can be found in sufficient quantity to satisfy the requirements of the act. It is not believed that Congress intended to confer any such right upon the company.

The decision of your office rejecting the company's said selection is accordingly affirmed. In view of this action the local office will place Brown's application for the land of record as of the date hereof, if upon examination the same be found regular in all respects.

RAILROAD GRANT—WITHDRAWAL—LANDS EXCEPTED.

NORTHERN PACIFIC RY. CO.

Lands within ten miles of the probable route of the Lake Superior and Mississippi railroad, included in the withdrawal on account of the grant to aid in the construction of said road at the date of the passage of the act making the grant to the Northern Pacific Railroad Company, were not "public lands," and for that reason were excepted from the Northern Pacific grant.

A reservation on account of a prior grant will defeat a later grant, like that made in aid of the Northern Pacific railroad, without regard to whether the lands are needed in satisfaction of the prior grant.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *July 16, 1901.* (F. W. C.)

The Northern Pacific Railway Company, successor in interest to the Northern Pacific Railroad Company, has appealed from your office decision of April 6, last, wherein it was held that certain described lands in the Duluth land district, Minnesota, and within the primary limits of the grant made by the act of July 2, 1864 (13 Stat., 365), in aid of the construction of the Northern Pacific railroad, were excepted from the operation of said grant because they were, at the date of the passage of said act, within ten miles of the probable route of the Lake Superior and Mississippi railroad, in aid of the construction of which a grant was made by the act of May 5, 1864 (13 Stat., 64), and were embraced within the withdrawal of May 26, 1864, made on account of the said last-mentioned grant.

Upon the adjustment of the limits of the grant made by the act of May 5, 1864, *supra*, to the line of definite location of the Lake Superior and Mississippi railroad, effected September 25, 1866, by the filing

and approval of the required map, the lands here in question were found to fall without said limits and were thereupon freed from said grant. The Northern Pacific railroad was not definitely located opposite these lands until July 6, 1882, at which date they were free from adverse claim so far as shown by the record now before this Department.

The appeal filed on behalf of the railway company is based upon the ground that the withdrawal of May 26, 1864, being a withdrawal upon a map of probable or general route, did not prevent Congress from granting the lands so withdrawn in aid of the construction of the Northern Pacific railroad, and that they were included in the grant to that company made by the act of July 2, 1864, because falling without the limits of the grant made by the act of May 5, 1864, as established by the definite location of the Lake Superior and Mississippi railroad, no right ever attached to them under the earlier grant. The decision of the court in the case of *United States v. Oregon and California R. R. Co.* (176 U. S., 28), is relied upon to sustain this claim.

In the case of *Bardon v. Northern Pacific Railroad Co.* (145 U. S., 535), one Robinson had settled upon a portion of an odd-numbered section within the limits of the grant made by the act of July 2, 1864, for which he filed a pre-emption declaratory statement on September 21, 1853. He died without making proof and payment under said filing, and on July 30, 1857, his heirs made payment for the land and certificate of purchase issued thereon. On August 5, 1863, said certificate and pre-emption filing were canceled. In holding that said land was excepted from the operation of the grant here in question, it was said by the court:

It is thus seen that when the grant to the Northern Pacific Railroad Company was made, on the 2d of July, 1864, the premises in controversy had been taken up on the pre-emption claim of Robinson, and that the pre-emption entry made was uncanceled; that by such pre-emption entry the land was not at the time a part of the public lands; and that no interest therein passed to that company. The grant is of alternate sections of public land, and by public land, as it has been long settled, is meant such land as is open to sale or other disposition under general laws. All lands, to which any claims or rights of others have attached, do not fall within the designation of public land. The statute also says that whenever, prior to the definite location of the route of the road, and of course prior to the grant made, any of the lands which would otherwise fall within it have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands are to be selected in lieu thereof under the direction of the Secretary of the Interior. There would therefore be no question that the pre-emption entry by the heirs of Robinson, the payment of the sums due to the government having been made, as the law allowed, by them after his death, took the land from the operation of the subsequent grant to the Northern Pacific Railroad Company, if the pre-emption entry had not been subsequently cancelled. But such cancellation had not been made when the act of Congress granting land to the Northern Pacific Railroad Company was passed; it was made more than a year afterwards. As the land pre-empted then stood on the records of the land department, it was severed from the mass of the public lands, and the subsequent cancellation of the pre-emption entry did not restore it to the public domain so as to bring it under the operation of previous legislation, which applied at the time to

land then public. The cancellation only brought it within the category of public land in reference to future legislation. This, as we think, has long been the settled doctrine of this court.

See also *Northern Pacific Railroad Co. v. De Lacey* (174 U. S., 622, 626).

Applying this ruling to the lands now in question, they were at the time of the grant to the Northern Pacific Railroad Company included within an existing and lawful withdrawal made in aid of a prior grant and were therefore not subject to sale or other disposition under general laws. They were not "public lands" within the accepted meaning of those words (*Barker v. Harvey*, 181 U. S., 481, 490) and were not within the terms of the grant to the Northern Pacific Railroad Company, which was of "every alternate section of *public land*."

While the decision in the case of *United States v. Oregon and California Railroad Company*, cited by appellant, gives color to appellant's contention, it must be remembered that in that case the lands in controversy were not reserved under the prior grant or at all until after the date of the later grant under which they were held to have passed. They were public lands at the time of the later grant which was held to have embraced them. The case of *Bardon v. Northern Pacific R. R. Co.*, *supra*, and kindred cases, were not referred to in the opinion of the court, and it can not be presumed that by any general discussion upon an immaterial point the court intended to overrule the *Bardon* and kindred cases.

That a right under the prior grant did not eventually attach to the lands here in question is immaterial: first, because the act of July 2, 1864, was a grant *in praesenti*, and second, because a reservation on account of a prior grant will defeat a later grant like that of July 2, 1864, whether the lands are needed in satisfaction of the prior grant or not. *Northern Pacific R. R. Co. v. Musser-Sauntry Co.* (168 U. S., 604.)

Your office decision is accordingly affirmed.

SCHOOL LAND—INDEMNITY—CHARACTER OF LAND.

BOND ET AL. v. STATE OF CALIFORNIA.

In school indemnity selections the lands in lieu of which indemnity is claimed should be described according to their legal subdivisions.

Where school lands in lieu of which indemnity is claimed on the ground of their saline character are not shown to have been lost to the State by reason of their known mineral or saline character at the time of survey, a hearing should be had to determine their known character at such time.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *July 17, 1901.* (E. B., Jr.)

February 15, 1898, the State of California filed indemnity school land selection No. 1854 for the SW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 22;

the SE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 15; and the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 9, T. 10 N., R. 1 E., H. M., Eureka, California, land district, in lieu of "440 acres" in section 16, T. 10 S., R. 11 E., S. B. M., alleged to be saline land and so reserved from the school land grant to the State. August 27, 1900, William H. Rotermund applied to purchase the SW. $\frac{1}{4}$ of said section 22, and Samuel Bond applied to purchase the SE. $\frac{1}{4}$ of said section 15, as timber lands, under the act of June 3, 1878 (20 Stat., 89). The applications of Rotermund and Bond were rejected by the local office because the lands covered thereby were embraced in the school indemnity selection of the State.

The applicants thereupon appealed and also filed duly corroborated affidavits of contest against the State's selection as to the lands in controversy, alleging "upon personal investigation and from reliable information" that the portion of said section sixteen used as the basis for such selection was neither mineral nor saline land, and that the lands covered by said applications are very valuable for the timber growing upon them: Wherefore affiants asked that a hearing be had "to determine the legality of said State selection and the character and quality of the lands used as the basis" for the selection of the lands covered by their respective applications, and at which they might be given opportunity to establish the allegations of their said affidavits.

The State's selection was considered in your office decision of October 15, 1900, in connection with the corroborated contest affidavit of Bond (no mention being made therein of Rotermund's similar affidavit). It was observed in the decision that the basis for the selection was defective in being described simply as "440 acres" in said section 16 instead of by legal subdivisions, it being "impossible to say what legal subdivisions are meant to be used;" and apparently in view of the allegations of Bond that the land used as such basis was neither mineral nor saline in character, the following direction was given to the local officers:

Give the State authorities 60 days' notice within which to apply for an order for a hearing to determine the validity of the basis for this selection and in default thereof and of appeal the State's selection will be canceled without further notice.

The State afterwards urged that it should be allowed to amend its selection by describing the lands used as the basis therefor according to the legal subdivisions thereof, and that the hearing was not warranted inasmuch as the saline character of said section sixteen had already, together with that of other so-called school sections in the vicinity, been shown at a previous hearing, and the said section sixteen had also been returned by the surveyor-general as saline land. Not considering whether the State should be permitted to amend the description of its basis, your office, by decision of January 29, 1901, denied the other contention, saying:

It is essential that the bases designated by the State should be described by legal subdivision in order that this office may intelligently inquire into and ascertain the

character thereof. The particular school section sought to be so used in this case was not involved in the hearing which resulted in office decision of July 25, 1898, which embraced section 36 of the same township, and its character has not been investigated by this office. The plat of survey does show said section to be situated in the bed of a dry salt lake, but the general description accompanying the field notes of survey does not return said section as saline in character, and the assertion of the State that it is saline land has been controverted by protestants Bond and Rotermund.

From these decisions the State has appealed to the Department, having, on December 6, 1900, filed an amended selection designating the base lands as the E. $\frac{1}{2}$, the N. $\frac{1}{2}$ of NW. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of said section sixteen.

Only two questions are passed upon in the decisions appealed from: (1) As to the sufficiency of the description of the base lands given in the State's original selection; and (2) as to whether a hearing is warranted to determine the character of the base lands.

In school indemnity selections, the lands in lieu of which indemnity is claimed should undoubtedly be described according to their legal subdivisions. The description originally used here, "440 acres" in section 16, was altogether uncertain and inadequate.

Ample reason exists for the hearing ordered by your office. It is essential to the State's claimed right of indemnity selection that the lands intended to be used as the basis therefor shall have been lost to the State by reason of their mineral or saline character, or of being otherwise reserved from the State's grant. They are not otherwise reserved, and, unless they were known to be mineral or saline in character at the time of survey (that being after the State's admission into the Union), they were not lost to the State but passed to it under its grant and no indemnity can be obtained therefor. The hearing referred to in the appeal and in the quoted portion of the decision of your office on review, did not embrace the land here sought to be used as the basis for indemnity, nor does the character of that land at the date of the survey thereof appear to be satisfactorily shown by the survey, or otherwise. It is therefore eminently proper, in view of the allegations of Bond and Rotermund, that a hearing should be had to determine whether the land was mineral or saline in character at the time of survey.

It is contended by the State that Bond is a protestant merely (and the contention applies equally to Rotermund), and that if a hearing is had to determine the character of the land assigned as the basis for indemnity he will have no standing thereat and that the hearing must be *ex parte*, but this contention is not sound.

Your said office decisions of October 15, 1900, and January 29, 1901, are affirmed.

MINING CLAIM—IMPROVEMENTS—EXPENDITURES.

HIGHLAND MARIE AND MANILLA LODE MINING CLAIMS.

Labor or improvements to be credited toward meeting the requirements of the statute as to expenditure on a mining claim must actually promote or directly tend to promote the extraction of mineral from the land, or forward or facilitate the development of the claim as a mine or mining claim, or be necessary for its care or the protection of the mining works thereon or pertaining thereto.

Claimant's quartz mill, situated on one of his claims in another group, even if constructed by him for the express purpose of crushing ores from the claims embraced in this entry, could not be accepted as an improvement made for the benefit of those claims or either of them, within the meaning and intent of the statute.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *July 17, 1901.* (E. B., Jr.)

The decisions of your office dated January 28, and March 18, 1901, the latter on review, in mineral entry No. 3896, made August 28, 1900, by Louis S. McLure for the Highland Marie and Manilla lode mining claims, surveys Nos. 5770 and 5771, Helena, Montana, land district, hold that no part of the value of a certain ten stamp quartz mill valued at \$4000, and credited by the surveyor general to the said claims, respectively, as expenditure for the benefit thereof, under section 2325 of the Revised Statutes, can be accepted as such expenditure; and there not being other labor or improvements credited to the claims, of sufficient value to satisfy the statute, the said decisions also, in effect, hold the entry for cancellation on that account.

The reasons given by your office for refusing to accept any part of the value of such mill toward meeting the requirements of the statute as to expenditure are thus stated in said decision of March 18, 1901, on review:

It has been held by the Department that improvements made outside of the boundaries of a mining claim may be accepted as sufficient if shown to aid in the extraction of mineral therefrom (6 L. D., 220; 17 L. D., 190), but I am of the opinion that the mill sought to be applied in this case does not fall within the rule therein announced. It is situated more than half a mile from the claim, upon another group of lode claims owned by applicant, and is, no doubt, used for the milling of ores from all the claims owned by applicant in the vicinity. Furthermore, while a mill is of indirect benefit to a lode claim, in that it is of use in extracting the precious metals from the ores after same have been mined, yet it is of no direct benefit or aid in the actual development of the claim.

The claimant has appealed from the decision of your office, insisting that the said mill is "a necessary part of and used in connection with the working and improvement of said claims and credited thereto," and as such is an improvement inuring to the benefit of each of the claims within the meaning of the statute.

The said claims, together with the Mollie Darling lode mining claim embraced in mineral entry No. 3895, also made by McLure, form a

small group of contiguous claims. The said mill, which is a mill for crushing ores, is situated on the Venus lode mining claim, which is one of eleven other contiguous claims embraced in mineral entry No. 3894, also made by McLure. In addition to these entries McLure has also made mineral entry No. 3897 for six other contiguous claims, and mineral entry No. 4005 for a single claim, the Saturn placer. These claims are apparently all owned by said McLure, the three claims in entry No. 3896 being in one body or contiguous group, and the eighteen other claims in another body or such group. The said mill is over 3300 feet southward from the southerly end of the Manilla claim, which is the nearest thereto of the first group. It does not appear when or by whom the mill was constructed, or that it has ever been used for crushing any ore from the Highland Marie or the Manilla claim, or indeed whether it has ever been operated at all.

But even if it had been so used or had been constructed or purchased by the applicant for patent for the express purpose of crushing ores from the claims embraced in the entry here under consideration, it is not believed that it could be accepted as an improvement made for the benefit of those claims or either of them, within the meaning and intent of the statute. The Department is not aware of any instance in which such a mill so situated has ever been held, either by the land department or by the courts, to be properly credited as an improvement for the benefit of a mining claim in contemplation of the mining laws. Under the decisions of the courts and the land department labor or improvements to be so credited must actually promote or directly tend to promote the extraction of mineral from the land or forward or facilitate the development of the claim as a mine or mining claim, or be necessary for its care or the protection of the mining works thereon, or pertaining thereto (*Smelting Co. v. Kemp*, 104 U. S., 636, 655; *Book v. Justice M. Co.*, 58 Fed. Rep., 106, 117; *U. S. v. Iron Silver Mining Co.*, 24 Fed. Rep., 568; *Lockhart v. Rollins* (Idaho) 21 Pac. Rep., 413; *Doherty v. Morris* (Colo.) 28 Pac. Rep., 85; *Copper Glance Lode*, 29 L. D., 542; and *Zephyr and other Lode Mining Claims*, 30 L. D., 510, 513).

There is a sense, of course, in which the ownership of a mill in the vicinity of a mine, for crushing or reducing ores, by one who is also the owner of the mine, may promote the development of the mine, but so also doubtless, to some extent, might the development of the mine be hastened or promoted by the ownership or interest of such mine owner in a stock of mining implements or machinery kept in a general supply store in the neighborhood, or by his ownership or interest in a tramway or railway built to bring in supplies and carry out mining products to and from the nearest mining camp. But in all these instances the connection between the ownership or interest in the thing mentioned and the development of the claim or the extrac-

tion of ore therefrom is too remote to justify holding such thing to be an improvement upon or for the benefit of the claim, or the crediting of the value of any part thereof toward the required expenditure.

It is not deemed necessary nor desirable that the subject be further pursued at this time, nor to undertake to state herein in detail what particular labor, buildings, excavations, etc., may or may not be accepted as meeting the requirements of the mining laws upon the point under consideration. Indeed, subject to the general rule above laid down, the determination in each case must depend upon the facts of that case.

The decision of your office is affirmed in accordance with the views herein expressed. The entry must be canceled.

It will not be necessary, however, for the claimant to file a new application for patent or to furnish new proofs upon any point, except to give new notice of the application by publication and posting and to file the necessary proofs thereof, and the certificate of the surveyor general as to expenditure, if the proofs now on file are otherwise sufficient, and if, as would seem from the affidavit of claimant's attorney in fact to be the case, due expenditure as to both claims has now been made.

RIGHT OF WAY—INDIAN LANDS—ACT OF MARCH 2, 1899.

OPINION.

A railroad company upon compliance with the provisions of the act of March 2, 1899, is authorized to acquire thereunder rights of way through lots or lands situate within the limits of any townsite in the Indian Territory, the national or tribal title to which has not been extinguished by full payment of the purchase money therefor and by the execution and delivery of deeds of conveyance thereof in accordance with an act of Congress authorizing such conveyance.

The right of a railroad company to extend its line of road over and across a navigable stream within the Indian Territory by means of a bridge to be constructed over such stream for that purpose, can only be secured by act of Congress granting such privilege; but this does not affect the authority of the Secretary of the Interior in approving maps of definite location for rights of way, under the act of March 2, 1899, for even though the stream be navigable, his approval of the maps is a condition to the right to approach the bridge from the Indian lands on either side of such stream.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, July 19, 1901. (J. H. F.)

By your reference I am in receipt of certain letters, with enclosures, received from the Commissioner of Indian Affairs, transmitting to the Department for its consideration, under the provisions of the act of March 2, 1899 (30 Stat., 990), map of the definite location of the surveyed route of a section of the Shawnee, Oklahoma and Missouri Coal

and Railway Company's line of road, extending from Muskogee, in the Creek Nation, to Fort Gibson, in the Cherokee Nation, Indian Territory, and maps of definite location of the surveyed route of a section of the Muskogee and Western Railroad Company's line of road, extending from Fort Gibson to Muskogee, together with certain other papers relative to the right of the Muskogee City Bridge Company to construct a toll bridge over the Arkansas river in the Cherokee Nation. The maps of definite location transmitted disclose that the surveyed routes of the sections of both railroads involved cross the Arkansas river in the Cherokee Nation, extend for a considerable distance within the exterior limits of the town of Fort Gibson, and extend across and for a considerable distance within the surveyed exterior limits of the townsite of Muskogee; and the papers accompanying the map of definite location of the route of the Muskogee and Western Railroad Company's line of road further disclose that said company proposes to extend the line of its road over and across the Arkansas river by means of a toll bridge which the Muskogee City Bridge Company, a separate corporation, proposes to construct at a point in the Cherokee Nation where the surveyed route of said railroad company's line of road intersects said river, under the claimed authority of a decree of the United States court for the northern district of Indian Territory, entered, June 4, 1901, in pursuance of the provisions of the act of February 18, 1901 (31 Stat., 794), entitled "An act to put in force in the Indian Territory certain provisions of the laws of Arkansas relating to corporations and to make said provisions applicable to said Territory." In the letters received from the Commissioner of Indian Affairs, transmitting the maps and papers aforesaid, it is stated that consideration thereof involves questions to which the attention of the Department is invited and upon which, by your reference, my opinion is requested, as follows: First, whether said railroad companies, under the provisions of the act of March 2, 1891, *supra*, can acquire rights of way through townsites in the Indian Territory; second, whether, under the provisions of that act, said companies are authorized to extend their lines of road over and across the Arkansas river within said Territory and to bridge said stream for such purpose; and, third, whether the alleged application of the Muskogee City Bridge Company to construct the proposed toll bridge over the Arkansas river is properly made, and whether the provisions contained in the act of February 18, 1901, *supra*, are properly applicable in the matter of such application.

The papers submitted show that both of the railroad companies named, under the provisions of the act of March 2, 1899, *supra*, have heretofore, respectively, been granted permission to survey and locate lines of railroad within the Indian Territory on routes generally described and substantially in conformity with those designated on

their respective maps of definite location now presented for approval; that the proposed route of the Shawnee, Oklahoma and Missouri Coal and Railway Company's line of road extends from Shawnee, Oklahoma Territory, in a northeasterly direction through the Indian Territory to the west line of the State of Missouri at or near the town of Seneca; that maps of definite location of certain portions of the surveyed route of this company's line of road, including that portion thereof extending from Oklahoma Territory within the Creek Nation to Muskogee in the Indian Territory, have heretofore been approved by the Department; that the proposed general route of the Muskogee and Western Railroad Company's line of road extends in a westerly direction from Fort Gibson, in the Cherokee Nation, to the west line of the Creek Nation and thence to Guthrie, Oklahoma Territory; that both of said railroad companies, in the matter of furnishing evidence of their organization and in the survey and location of their respective lines of road within the Indian Territory, have complied with all the requirements of the regulations prescribed by the Department under the act of March 2, 1899, *supra*, and that the maps of definite location under consideration herein have been prepared and filed in conformity to such requirements.

By the act of March 2, 1899, *supra*, there was granted to any railroad company, organized under the laws of the United States or of any State or Territory, upon compliance with the provisions of said act and the regulations prescribed thereunder, a right of way—

through any Indian reservation in any State or Territory, or through any lands held by an Indian tribe or nation in Indian Territory, or through any lands reserved for an Indian agency or for other purposes in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation.

Any railroad company, organized as aforesaid, is authorized, under the provisions of said act, to survey and locate a line of road through and across any lands of the character therein designated upon obtaining permission therefor from the Secretary of the Interior, but the act further provides that—

Before the grant of such right of way shall become effective a map of the survey of the line or route of said road must be filed with and approved by the Secretary of the Interior and the company must make payment to the Secretary of the Interior for the benefit of the tribe or nation of full compensation for such right of way, including all damage to improvements and adjacent lands, which compensation shall be determined and paid under the direction of the Secretary of the Interior, in such manner as he may prescribe—

and, when a railroad is constructed through the Indian Territory, under the provisions of said act, payment by the company of an additional annual charge of not less than fifteen dollars per mile for each mile of road is exacted for the benefit of the particular nation or tribe through

whose lands the road may be located so long as said lands shall be owned and occupied by such nation or tribe.

It will be noted that the surveyed routes of the two sections of roads involved herein are located wholly upon lands within the Creek and Cherokee Nations, in the Indian Territory, and that portions of the routes of both roads extend within the exterior limits of the towns hereinbefore mentioned.

The records of the Department disclose that the townsite of Muskogee was surveyed and laid out by a townsite commission appointed in accordance with the provisions of the act of Congress commonly known as the Curtis act, approved June 28, 1898 (30 Stat., 495), such survey having been approved by the Department June 4, 1900; that the lots in said townsite were appraised by said commission, but a judge of the United States court for the northern district of the Indian Territory, on complaint of the Creek Nation, having issued a restraining order enjoining the sale of lots therein, the commission was furloughed August 29, 1900. The records of the Department further show that the members of the townsite commission for Muskogee were reappointed June 28, 1901, under and in pursuance of the provisions of the act of March 1, 1901 (31 Stat., 861), amending, ratifying, and confirming an agreement negotiated with the Creek Nation March 8, 1900, which agreement, as amended, has since been ratified by act of the Creek national council and duly declared existing law according to the terms thereof by proclamation of the President issued June 25, 1901; and June 28, 1901, the United States Indian Inspector for the Indian Territory was directed to instruct said commission to prepare corrected schedules of the appraisement of lots and improvements thereon within the townsite of Muskogee in accordance with the provisions of the Creek agreement recently ratified as aforesaid. It further appears that none of the lots in said townsite have been conveyed under authority of any of the acts of Congress hereinbefore referred to, and that the national or tribal title to all of said lots still remains vested in the Creek Nation. The Curtis act specially provided that all townsites should be "reserved to the several tribes" and should be set apart as incapable of general allotment. Provision was made in that act whereby the owner of permanent improvements upon any town lot might, after appraisement of such lot by the townsite commission, deposit in the United States treasury, at Saint Louis, one-half of the appraised value thereof, payable in instalments therein specified, and that such deposit should be deemed a tender to the tribe of the purchase money for such lot, whereupon such tribe was authorized to cause a deed to be executed and delivered to any such purchaser conveying to him the title to such lot, and thereafter the purchase money should become the property of the tribe; and provision was also made in said act whereby the inhabitants of any town might, within one year after the comple-

tion of the survey thereof, make such deposit of ten dollars per acre for parks, cemeteries, and other public grounds laid out by said townsite commission with like effect as for improved lots. Under the further provisions of said act, if the owner of improvements on any lot failed to make deposit of the purchase money as aforesaid, then the townsite commission was authorized to sell such lot at public auction in the manner therein provided for the sale of unimproved lots, the purchaser of such improved lot being required to institute proceedings in the United States court having jurisdiction thereof for the condemnation and appraisal of such improvements and the owner of such improvements being given the option of accepting the adjudged value of the improvements or removing the same from the lot within such time as might be fixed by the court. In accordance with the provisions noted it appears that certain deposits have been made in partial payment of improved lots in Muskogee, but whether any such deposits have been made for parks, cemeteries, or other public grounds is not shown. No deeds, however, have been executed or delivered by the tribal authorities for any lots or lands within such townsite either under the provisions of that act or the provisions of the agreement hereinbefore mentioned, subsequently negotiated with and ratified by the Creek Nation. By the terms of said agreement so ratified the class of persons authorized to make deposits for town lots with the preferred right of purchase was enlarged, and provision was therein made for the execution and delivery of deeds therefor by the tribal authorities, on approval by the Secretary of the Interior, in substantial conformity with the provisions of the Curtis act. The title to all lands within the Creek Nation is held by and vested in such nation as a tribe, and it is, therefore, evident that the surveying and laying out of the townsite of Muskogee by the townsite commission and the appraisal of the lots and lands therein did not operate to extinguish the national or tribal title to such lots or lands within the limits of such townsite; and it is equally clear that until the depositors hereinbefore mentioned have made full payment for the lots, on account of which such deposits have been made, and have secured the execution and delivery of deeds therefor by the tribal authorities in accordance with the provisions of the acts of Congress and the Creek agreement hereinbefore referred to, the title to such lots still remains vested in the Creek Nation and that the lots constitute lands of the class described in the right of way act of March 2, 1899, *supra*, being "lands held by an Indian tribe or nation in the Indian Territory."

It further appears that no townsite commission was ever appointed for the town of Fort Gibson, in the Cherokee Nation, and no townsite has been surveyed or laid out for that town in accordance with the provisions of the Curtis act, *supra*, or other act approved by Congress. The town was laid out and incorporated by act of the Chero-

kee council and some of the lots therein have been sold, but such sales, under existing treaty stipulations, only operated to give the purchaser of such lots the right to the use and occupancy thereof. The fee to lands within the Cherokee Nation is vested in the nation as a tribe, and until the national or tribal title to lands within Fort Gibson has been extinguished by consent of the United States, under agreement duly ratified with the Cherokee Nation or in accordance with the provisions of an act of Congress, such lands are lands "held by an Indian tribe or nation" and are, therefore, of the class designated in the right of way act aforesaid.

Answering specifically, therefore, the first question involved in your reference, I am of opinion that the railroad companies hereinbefore named, upon compliance with the provisions of the act of March 2, 1899, *supra*, are authorized to acquire thereunder rights of way through lots or lands situate within the limits of any townsite in the Indian Territory, the national or tribal title to which has not been extinguished by full payment of the purchase money therefor and by the execution and delivery of deeds of conveyance thereof in accordance with an act of Congress authorizing such conveyance; and I am also of opinion that your action in approving maps of definite location for railroad rights of way, under the provisions of the act of 1899, *supra*, is limited to and affects only lands of the class designated in said act, and that, although such maps might disclose that the lines of road, as surveyed, traversed other lands, yet such fact would not constitute any obstacle to the approval of the maps for the reason that your official act of approval would not and could not, in legal effect, operate to confer, upon the companies applying for such rights of way, any right, title, or interest whatever in, to, or over such other lands against the individual owners thereof who had lawfully perfected title thereto.

Coming, then, to a consideration of the second question involved in your reference, namely, as to whether said railroad companies, under the provisions of the right of way act aforesaid, have the right to extend their lines of road over and across the Arkansas river in the Cherokee Nation by means of bridges to be constructed for that purpose at the points where the surveyed routes of such roads intersect said stream, I am at a loss to understand why this question is asked. There is no suggestion in the papers submitted that the Arkansas river is at this point a navigable stream. If it is not, I answer the question in the affirmative, but if it is a navigable stream at this point, my answer is that a right to cross the same by means of a bridge can be secured only by an act of Congress granting that privilege (see act of March 31, 1899, 30 Stat., 1120, 1151). This, however, is not a question which affects your authority in approving the maps of definite location under consideration, and even if the stream be navigable your

approval of the maps is a condition to the right to approach the bridge from the Indian lands on either side of the river.

The further question is presented by your reference as to whether the so-called application of the Muskogee City Bridge Company to construct a toll bridge over the Arkansas river is properly made and whether the act of Congress of February 18, 1901, hereinbefore referred to, is applicable thereto. Apart from the question whether, under this act and section 504 of Mansfield's Digest of the Statutes of Arkansas, published in 1884, this matter comes within the jurisdiction of this Department for determination, I find, upon examination of the papers transmitted, that no application by said bridge company to construct or maintain such a bridge is pending before this Department requiring consideration by you.

Approved:

E. A. HITCHCOCK, *Secretary.*

PRIVATE CLAIM—CERTIFICATE OF LOCATION—NOTICE—ACT OF JUNE 2,
1858.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., July 24, 1901.

The United States Surveyor General,

New Orleans, Louisiana.

SIR: Hereafter when an administrator of a vacant succession makes application for certificates of location under the provisions of the third section of the act of June 2, 1858 (11 Stat., 294), in satisfaction of a private claim, before issuing such certificates, you will require the applicant to publish notice of such application in the manner hereinafter set forth.

The notice must contain the name of the administrator, and must show when and by what court he was appointed. It must also contain a full and complete description of the claim in satisfaction of which the certificates are applied for, and if the claim has been located in part, the notice must describe the land located by section, township, and range.

Some day must be named in the notice, prior to which any, who may so desire, may file in your office protests against the application, together with their reasons for such protests.

This notice must be published at least once a week for five successive weeks prior to the day named as set forth above, in a paper of general circulation, published in the parish in which the claim is located, and also in one of the leading daily papers published in the city of New Orleans.

Should any protests be filed, they will be duly considered by you.

The affidavits of the publishers of the respective papers, together with printed copies of the notice, will be required to prove the publications, all of which must be made a part of your report on the case, and forwarded to this office with the other papers.

Very respectfully,

BINGER HERMANN,
Commissioner.

Approved:

E. A. HITCHCOCK,
Secretary.

HOMESTEAD—COMMUTATION—SEC. 2, ACT OF JUNE 5, 1900.

INSTRUCTIONS.

All persons who have acquired title to a homestead by commutation, whether under the provision of section 2301 of the Revised Statutes or under any one of the special acts relating to Oklahoma lands, are, if otherwise qualified, entitled to enter a homestead of the Comanche, Kiowa and Apache lands.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *July 24, 1901.* (G. B. G.)

Section 2 of the act of June 5, 1900 (31 Stat., 267), provides:

That any person who has heretofore made entry under the homestead laws and commuted same under provisions of section twenty-three hundred and one of the Revised Statutes of the United States and the amendments thereto shall be entitled to the benefits of the homestead laws, as though such former entry had not been made, except that commutation under the provisions of section twenty-three hundred and one of the Revised Statutes shall not be allowed of an entry made under this section of this act.

By an act of June 6, 1900 (31 Stat., 672, 676, 679-680), it was provided that the lands acquired from the Comanche, Kiowa, and Apache tribes of Indians in the Indian Territory should be opened to settlement by proclamation of the President, "under the general provisions of the homestead and townsite laws of the United States," with a proviso: "That any persons who, having attempted to but for any cause failed to secure a title in fee to a homestead under existing laws, or who made entry under what is known as the commuted provision of the homestead law, shall be qualified to make a homestead entry upon said lands."

In a letter of inquiry dated April 25, 1901, your office asks to be instructed "whether persons who commuted former entries in Oklahoma Territory under special statutes providing therefor, can make second entries for the Kiowa, Comanche, and Apache lands," under the provisions of law above quoted.

In providing for the disposition of lands in Oklahoma Territory

special statutes have been enacted, and the provisions of these statutes have been such as to take these lands out of the operation of some of the general provisions of the homestead law. They all provide that the commutation provision of the homestead law, as set forth in section 2301 of the Revised Statutes, shall not apply, but instead of this general commutation provision these several acts provide that title to the lands affected thereby may be secured upon proof of residence for less than the five-year period required of homesteaders, and the payment of a certain sum per acre for the lands entered. These special provisions have been referred to by Congress and mentioned by the Department as commutation provisions so uniformly that it is but reasonable to suppose that Congress, by the said acts of June 5, 1900, and June 6, 1900, in referring to persons who have made entry under section 2301 of the Revised Statutes and the amendments thereto, and persons who made entry under the commuted provisions of the homestead law, intended to include all persons who had commuted an entry to cash under any statute permitting such commutation. Commutation means literally "substitution," and the commutation of a homestead entry is simply the payment of cash at a price per acre fixed by the act under which the substitution is made, in lieu of the remaining portion of the term of residence required by law, and your office is advised that all persons who have acquired title to a homestead under such substitutive plan, whether it be under the provisions of section 2301 of the Revised Statutes or under any one of the many special acts relating to Oklahoma lands, such person, if otherwise qualified, will be entitled to enter a homestead of the Comanche, Kiowa, and Apache lands.

FOREST RESERVE—SETTLEMENT.

ARNOLD WINK.

The excepting clause of the proclamation establishing the Olympic forest reservation ceases to be operative in behalf of a settler who fails to make entry or filing for the lands settled upon within the time allowed by law.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *July 29, 1901.* (C. J. G.)

Arnold Wink appeals from your office decision of April 11, 1901, rejecting his application to make homestead entry for lots 1, 3, 4, 5, and the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 12, T. 30 N., R. 16 W., Seattle, Washington, land district.

The land described is within the limits of the Olympic Forest Reservation established by the President's proclamation of February 22, 1897 (29 Stat., 901), which excepts from the force and effect thereof—

all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States Land

Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired; and all mining claims duly located and held according to the laws of the United States and rules and regulations not in conflict therewith.

Provided, That this exception shall not continue to apply to any particular tract of land unless the entryman, settler or claimant continues to comply with the law under which the entry, filing, settlement or location was made.

Under such proclamation and the homestead law a settler within the Olympic Forest Reservation who continues to comply with the law, has three months from the date of the filing of the plat of survey of the township embracing his land in which to place his claim of record. In this case such plat was filed in the local office July 25, 1900, and the applicant herein did not apply to enter until December 10, 1900, which was not within the statutory period. His explanation for the failure is "that he was sick at his said homestead and unable to make the trip to the nearest place he could file and furthermore did not know that the reserve rules would prevent his filing after 90 days." He furnishes the certificate of a physician who states that he attended applicant during the months of August, September and October, 1900, and "that during that time he was unable to do any manual labor and was part of the time confined to his bed and has been since and is now under my treatment."

The applicant alleges that he settled on the land in question in June, 1896, and has continued to reside thereon ever since, but he is not corroborated in this statement, nor does he furnish any evidence of the extent and character of his cultivation and other improvements from which it could be determined whether he has continued to comply with the law in that respect or not. It appears that it was not necessary for him to visit the district land office in order to make entry (act of May 26, 1890, 26 Stat., 121, amending Sec. 2294, R. S.) and his present application was executed before a United States commissioner, as provided for in said act.

By section 3 of the act of May 14, 1880 (21 Stat., 140), settlers under the homestead laws are given the same time to file their applications and make entry as was then given settlers under the pre-emption laws to put their claims on record (Secs. 2264-2266, R. S.). For various reasons it has frequently occurred that the time prescribed would be allowed to pass without the making of application or entry. In the absence of a valid adverse claim it has been the practice to allow the settler to make entry after the expiration of the statutory period. But such adverse claim would defeat the settlement right where the latter was not protected by entry or filing. It is believed that under the express terms of the proviso to the exception of the President's proclamation the neglect or failure of a settler on land within the limits of the forest reservation, to make entry or filing within the time

allowed by law, operates likewise to defeat his settlement right to such land.

By the failure of claimant to file application for the land within the time prescribed by the law, the excepting clause of the said proclamation ceased to be any longer operative in his behalf and the land at once came under the reserving power of the proclamation and ever since by force thereof has been part of the said forest reservation and not subject to homestead entry or other disposal (E. S. Gosney, 30 L. D., 44).

Your said office decision is hereby affirmed.

OKLAHOMA LANDS—COMMUTATION—SECOND HOMESTEAD ENTRY.

DAVID F. KETCHUM.

In view of the provisions of section 13 of the act of March 2, 1889, and section 2 of the act of June 5, 1900, one who has made a cash entry of Cheyenne and Arapahoe Indian lands under the act of October 20, 1893, is entitled to make a second homestead entry of lands in the Cherokee strip.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) July 30, 1901. (G. B. G.)

This is an appeal by David F. Ketchum from your office decision of December 20, 1900, holding for cancellation his homestead entry for the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 11, T. 21 N., R. 21 W., Woodward, Oklahoma.

This land lies in what is known as the Cherokee Outlet, and the body of lands of which it is a part was opened to settlement and entry under section 10 of the act of March 3, 1893 (27 Stat., 612, 642), which directed that they be opened in the manner provided by section 13 of the act of March 2, 1889 (25 Stat., 980, 1005), which section provided, among other things: "That any person . . . who made entry under what is known as the commuted provision of the homestead law shall be qualified to make a homestead entry upon said lands."

It appears that the said Ketchum had, on September 7, 1892, made a homestead entry at the Kingfisher land office, Oklahoma, for about one hundred and sixty acres of land in Sec. 19, T. 18 N., R. 20 W., upon which he made final proof and payment at the rate of one dollar and fifty cents per acre, and final certificate issued to him, April 3, 1896.

The land covered by this cash entry lies within the Cheyenne and Arapahoe reservation, and the body of lands of which it is a part was opened to settlement and entry under section 16 of the act of March 3, 1891 (26 Stat., 989, 1026), which provided that they should be disposed of to actual settlers only under the provisions of the homestead

and townsite laws, except section 2301 of the Revised Statutes should not apply. Said section 16 further provided that such a settler on said lands should, before making final proof and receiving a final certificate of entry, pay to the United States for the land so taken by him, in addition to the fees provided by law and within five years from the date of the first original entry, the sum of one dollar and fifty cents per acre, but no provision of any kind was made by said section or by said act opening the Cheyenne and Arapahoe lands whereby the title might be acquired except after the five years residence required by the homestead law had been complied with. By an act of October 20, 1893 (28 Stat., 3), it was provided, however, that any person entitled by law to take a homestead in the Territory of Oklahoma, who had already or might thereafter locate and file upon a homestead upon any of the Cheyenne and Arapahoe Indian lands, and who had complied with all of the laws relating to such homestead settlement, might "receive a patent therefor at the expiration of twelve months from the date of locating upon such homestead upon payment to the United States of one dollar and fifty cents per acre for the land embodied in such homestead."

In an affidavit executed by Ketchum "March 26, 189[6]," which is the basis of his application to purchase the land embraced in his entry of September 7, 1892, it is recited that he claims the right to "commute" said entry under section 2301 of the Revised Statutes, but in another affidavit, executed on the same day, on a blank form, "To be used in cases of commuted homestead entries in Oklahoma Territory," it is recited that said entry is "commuted under section 21 of the act of May 2, 1890" (26 Stat., 81, 91). This section has no application to Cheyenne and Arapahoe lands. It applies only to such lands as are within the limits described by the President's proclamation of April 1, 1889 (26 Stat., 1544), and the Cheyenne and Arapahoe lands are not within such limits. Moreover, it provides that the lands to which it does apply may be paid for at the rate of one dollar and twenty-five cents per acre, whereas Cheyenne and Arapahoe lands must be paid for at the rate of one dollar and fifty cents per acre. There is nothing in the papers connected with this cash entry to show that it was made under the act of October 20, 1893, *supra*, but, inasmuch as this was the only act which authorized its allowance, and inasmuch as its conditions seems to have been complied with, it will be presumed to have been made under that act.

By section 2 of the act of June 5, 1900 (31 Stat., 267, 269-270), it is provided:

Sec. 2. That any person who has heretofore made entry under the homestead laws and commuted the same under provisions of section twenty-three hundred and one of the Revised Statutes of the United States and the amendments thereto shall be entitled to the benefits of the homestead laws, as though such former entry had not

been made, except that commutation under the provisions of section twenty-three hundred and one of the Revised Statutes shall not be allowed of an entry made under this section of this act.

Your office in the decision appealed from holds that Ketchum's entry of September 7, 1892, was not commuted under the provisions of section twenty-three hundred and one of the Revised Statutes, that his case is not within the provisions of the act of June 5, 1900, above quoted, and that he is not therefore entitled to make a second entry by virtue of its provisions.

The department does not concur in this conclusion. The act of October 20, 1893, *supra*, is clearly a commutation act. The plan provided by the act of March 3, 1891, *supra*, for the acquisition of title to Cheyenne and Arapahoe lands, contemplated five years' residence as a condition precedent to the issuance of patent. The act of October 20, 1893, furnished a substitutive plan, whereby title to said lands might be completed upon the payment of cash in advance of the full period of residence required by the original plan. It is a commutation act, and as such will be treated as an amendment to section 2301 of the Revised Statutes. See in this connection departmental letter of July 24, 1901 (31 L. D., 46), in the matter of Comanche, Kiowa, and Apache lands. In view of the provisions of section 13, of the act of March 2, 1889, *supra*, and section 2 of said act of June 5, 1900, it is thought that Ketchum is entitled to make a second entry of lands in the Cherokee strip.

The decision appealed from is reversed, with directions to sustain the entry in question.

MINING CLAIM—CANCELLATION OF ENTRY—TRANSFeree OR MORTGAGEE.

ROMANCE LODE MINING CLAIM.

A transferee or mortgagee claiming under an entry, if his interest or claim is known to the land department, is entitled to notice of any action by the government affecting the entry, whether the fact of his interest is made known to the land officers by a statement under oath or in some other way.

An entry erroneously canceled without notice to a transferee whose interest was made known to the officers of the land department, will be reinstated upon application of the transferee.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *July 31, 1901.* (A. B. P.)

March 5, 1898, W. G. Tissington and Peter S. Jones made entry, No. 1646, Pueblo, Colorado, land district, for the Romance lode mining claim. November 16, 1899, your office required an amended survey of the claim to be made, to show the excluded conflict with another lode claim, known as the Little Dick. The surveyor-general of

Colorado was directed to notify the entrymen of said requirement, and that in default of the initiation of proceedings looking to a compliance therewith within sixty days, the entry would be canceled without further notice.

February 24, 1900, the surveyor-general reported that notice had been sent to each of the entrymen, November 27, 1899, by registered mail, and that the notice to Tissington had been acknowledged, but that to Jones had been returned unclaimed. Upon this report the entry was canceled by your office March 29, 1900.

April 11, 1900, the firm of Tiffany and Woodworth, attorneys, Colorado Springs, Colorado, addressed to your office a communication, wherein it was stated, in substance, that the entrymen, Tissington and Jones, had long since parted with their interest in said Romance claim; that the writers were the attorneys for the present owners of the claim; that these facts were known by the local land officers at Pueblo; and that notice of the required amended survey should have been sent to them or in their care. They thereupon asked that the canceled entry be reinstated and that a reasonable time be given them to secure the required amended survey. In response to inquiries by your office with respect to said communication, the local officers, July 6, 1900, reported that they had found among the files of their office a letter from Tiffany, Hamilton and Woodworth, dated March 19, 1898, in which the receipt of the receiver's duplicate receipt issued upon said entry was acknowledged, and it was stated that the Romance claim was then owned by the Silver State Consolidated Gold Mining Company, and the request made that the writers "be notified of any requirements in the case." In response to a further inquiry by your office, under date of July 19, 1900, as to whether the writers of said communication were attorneys of record in the case, the local officers reported, July 24, 1900, as follows:

Referring to your letter "N" of July 19, 1900, in the case of M. E. No. 1646, Romance lode, we have to report that the firm name of Tiffany, Hamilton and Woodworth was noted on our record as attorneys in this case in conformity with the practice of this office.

In the meantime, to wit, April 24, 1900, Charles F. Consaul filed his protest against the reinstatement of said entry, alleging, in substance, that no expenditure in labor or improvements had been made upon the claim embraced in said entry, "for at least two years last past;" that by reason thereof, on April 2, 1900, he relocated said claim as the Cypher lode claim, and intends to apply for patent thereto as soon as possible.

In a brief of argument filed September 20, 1900, in support of the protest, it is stated, as an additional ground against the reinstatement of said entry, that a portion of the improvements reported and relied upon in the proceedings upon which the entry was allowed, are on the

excluded Little Dick conflict, and therefore lost from the Romance claim; that on account of such loss the entry was not supported by an expenditure of labor or improvements sufficient under the law, was improperly allowed; and for that reason should not be reinstated, even though it should be found to have been irregularly canceled.

By decision of September 21, 1900, your office dismissed the protest and held the canceled entry for reinstatement upon condition that the amended survey be furnished as previously required. A motion for review filed by protestant was denied by your office decision of October 31, 1900. The protestant thereupon appealed. By departmental order of May 8, 1901, service of the appeal was required, and has since been made.

The first question presented by the record is, whether the Romance entry was regularly canceled upon notice to all parties interested, as disclosed by the land office records. If not, it is but fair to the parties claiming under the entry that it should be reinstated before the further matter of the alleged failure by the entrymen to show compliance with the law with respect to the required expenditure in labor or improvements on the claim, shall be taken up for consideration.

The entry was canceled upon the ground that the required amended survey was not furnished, and upon that ground alone.

It is true that by decision of June 14, 1898, your office directed that the entrymen be required, among other things, to make a further showing in the matter of expenditure in labor or improvements, in view of the loss to the Little Dick claim of a portion of the improvements reported in the entry proceedings. There is on file in the record, however, a letter, dated December 14, 1898, addressed to your office by the firm of Tiffany, Hamilton and Woodworth, attorneys, wherein they stated that the Romance claimants were—

prepared to comply with the requirements of June 14, if register and receiver at Pueblo were instructed to receive and entertain the proper papers and filings therein. They also requested that they be informed "when proper instructions will be given the Pueblo land office so that the matter may be closed."

December 22, 1898, your office advised said attorneys, in reply to their letter, that as motions for review of the decision of June 14, 1898, had been filed by the respective parties interested, no further action would be taken in the premises until said motions were disposed of. The motions for review were not disposed of until August 22, 1899. The requirements that a further showing be made in the matter of expenditure in labor or improvements on the Romance claim was not questioned in the motions. The next action taken by your office with respect to the entry was that of November 16, 1899, whereby an amended survey was required as hereinbefore stated, and at no time, so far as the record discloses, were the claimants under the entry, or their attorneys, Tiffany, Hamilton and Woodworth, informed, as

requested by the latter's letter of December 14, 1898, that they would be allowed to comply with the requirements of the decision of June 14, 1898, as in said letter they stated they were prepared to do.

If it be conceded that notice of the required amended survey was regularly given under the rules to the entrymen, Tissington and Jones, there yet remains the question whether notice should also have been given to the Silver State Consolidated Gold Mining Company, the assignee and then owner of the Romance claim. It is shown that the names of Tiffany, Hamilton and Woodworth were noted on the records of the land office at Pueblo, in accordance with the practice of that office, as attorneys for the entrymen. The local officers recognized them as attorneys of record in the case by mailing to them the receiver's duplicate receipt issued upon the entry. In the letter of said attorneys, of March 19, 1898, acknowledging said duplicate receipt, they notified the local officers that the Silver State Consolidated Gold Mining Company was then the owner of the claim embraced in the entry, and that they were the attorneys for said company. They also requested to be informed of any requirements in the case.

The Department is of the opinion that, under the facts stated, the Silver State Consolidated Gold Mining Company, through its said attorneys, was entitled to notice of the action of your office requiring an amended survey, upon pain of cancellation of the entry in default thereof, and that in the absence of such notice the entry was irregularly and erroneously canceled, and for that reason should be reinstated.

It has been frequently held that a transferee or mortgagee of land embraced in an unpatented entry, whose interest is disclosed by the land office records, or known to the land officers, is entitled to notice of any action by the government looking to the cancellation, or in any manner affecting the legal status, of the entry.

In the case of *Fleming v. Bowe* (on review, 13 L. D., 78, 79-80), which was a contest against an entry where the land had been transferred after final certificate and before the institution of the contest, it was said:

It appears in the evidence submitted at the trial before the local officers on the contest of *Fleming*, that testimony was introduced showing that the entryman had conveyed this tract to Norris before the initiation of said contest, and that he had conveyed the same to Lahman who then was the owner thereof, and the public records of the county where the hearing was had disclosed these transfers. After these facts were brought to the knowledge of the register and receiver, the transferees were entitled to a notice of the decision in said case. Lahman was then the actual party in interest, and as such was entitled to notice of all the decisions had in said case.

The case of *Powers v. Courtney et al.* (9 L. D., 480) was a contest instituted after the transfer of the land entered, without notice to the transferee, though the fact of the transfer was known to the contestant and the land officers prior to the contest. A hearing on the con-

test, the entryman having defaulted, resulted in a recommendation by the local officers that the entry be canceled. A petition for intervention, supported by proper affidavit under the rules, was subsequently filed by a remote transferee. In disposing of the petition the Department stated and held as follows:

It appears from the letter of the local officers dated December 18, 1885, the day this contest was initiated, that those officers knew that Courtney had disposed of his interest in the land to Wallace and that he (Courtney) made no further claim to it. It appears from the affidavit of contest as well as the deposition of the contestant in support thereof, that he knew that Courtney had conveyed his interest in the land by deed to Wallace, and that he, Courtney, had no further interest in the land, and claimed none.

Under these circumstances the real party (or parties) in interest, as known to the contestant and the local officers, should have notice of the contest, and have an opportunity to be heard in defence of his (or their) equitable right.

In view of all the facts disclosed in this case, I am of the opinion that the petition of the intervenor should be granted and if it appear that he bought from Wallace, that he should have the opportunity to cross-examine contestant's witnesses, and to prove in rebuttal, if he can, the good faith of Courtney, and his compliance with the law, in like manner as Courtney might, had he not transferred his right.

In the case of Daniel R. McIntosh (8 L. D., 641) the entry under which McIntosh claimed, made May 19, 1884, was held for cancellation by your office, of its own motion, July 22, 1887, and finally canceled October 19, 1887, on the ground of insufficiency of the proofs upon which it had been allowed. A petition and affidavit of intervention were subsequently filed by McIntosh, wherein it was shown that the land had been transferred by the entryman and had passed through several hands; that McIntosh was then and had been since November, 1886, the owner of the land; that in December, 1886, he had notified the register of the land office that he was the owner of the land; that no notice had ever been given him of the proceedings against the entry; and that he had not learned of such proceedings until shortly before the petition and affidavit were filed. He asked that the entry be reinstated by your office and that he be allowed to appeal from the action holding it for cancellation. Both requests were granted. In passing upon the case, the Department, among other things, said:

The transferee and appellant here not only placed his deeds on record but notified the local officers of his interest in the land and should have been notified of all action had in relation to said entry. The action of your office re-instating said entry and allowing the transferee to appeal from the decision holding said entry for cancellation, was therefore proper, and the case will be considered on its merits.

In the case of Charles C. Ferry (14 L. D., 126) it was said:

If the transferee had on file in the local office a statement showing his interest in the entry, he was entitled to notice of its cancellation; otherwise he is estopped from calling in question the validity of the proceedings against it.

See also, on the same subject: *United States v. Newman et al.* (15 L. D., 224); *Labrie et al. v. Conger* (18 L. D., 555, 556-7); and *Whitney v. Spratt* (64 Pac. Rep., 919).

The appellant's principal contention on this point is based upon rule 102 of Rules of Practice, which provides that—

No person not a party to the record shall intervene in a case without first disclosing on oath the nature of his interest.

It is clear that this rule has reference to a case where a person, not a party to the record, asserts an interest in the subject matter of the controversy, and seeks to intervene in the case for the purpose of defending his interest. Before he shall be allowed to become a party he is required to disclose on oath the nature of the interest asserted. It was not intended by the rule to prescribe a mode whereby a transferee or mortgagee must make known his interest to the land department in order to entitle him to notice of action by the government affecting an entry under which he claims. Such was, in effect, the holding of the Department as early as April 26, 1887, in the case of American Investment Co. (5 L. D., 603, 604-5), wherein it was said:

Rule 102, requiring that no person shall intervene in a case without disclosing under oath the nature of his interest, has reference to what proof shall be required in the investigation of a case where an intervenor is seeking to sustain the validity of an entry, but the production of proof is not necessary for the purpose of disclosing an interest in order to entitle them to notice of adverse action in any case in which they have an interest as assignee or mortgagee.

When an entryman has fully complied with the law and received certificate of entry, he can dispose of the land covered by his entry. A transfer of such right as the entryman may then possess gives to the assignee a right to be heard to sustain the validity of that entry, and hence he is entitled to be made a party to any proceeding involving the cancellation of said entry by disclosing under oath the nature of his interest. But an assignee or mortgagee should not be required to file either the original or certified copy of his mortgage or deed of assignment to entitle him to notice because the action of your office might not be adverse to the entry, and in such case there would be no necessity to intervene. If the entry is held for cancellation, notice should always be given to an assignee or mortgagee, if the fact of such interest is known, who will then be allowed to intervene to sustain the validity of the entry by disclosing under oath the nature of their interest and making proof thereof as required by Rule 102.

A transferee or mortgagee claiming under an entry, if his interest or claim is known to the land department, is entitled to notice of any action by the government affecting the entry, whether the fact of his interest is made known to the land officers by a statement under oath or in some other manner. Before he can be recognized as a party to the controversy, however, he is required to disclose on oath the *nature* of his interest.

The Silver State Consolidated Gold Mining Company was not notified of the action of your office, of November 16, 1899, requiring an amended survey and holding the entry in question for cancellation in default thereof, although said company, through its attorneys, had, in writing, previously informed the local land officers of its purchase and ownership of the Romance claim; nor was said company notified

of the action subsequently taken with respect to said entry. For this reason the decision of March 29, 1900, cancelling said entry, is hereby vacated, and the entry will be reinstated upon the records with like effect as though it had never been canceled. Your office decisions of September 21, and October 31, 1900, in so far as they deal with the question herein considered and decided and are in harmony with the views herein expressed, are affirmed. In other respects said decisions are hereby vacated.

It appears from the record that the amended survey required by your office was furnished in November, 1900. Thereupon, by decision of December 24, 1900, your office held that the entry should be reinstated, subject to certain requirements in the matter of the proof of expenditure in labor and improvements on the claim. Said decision was, presumably through inadvertence, irregularly rendered within the time allowed for appeal from the decisions of September 21, and October 31, 1900, and is, for that reason, also hereby vacated.

It is not intended by this decision to go further into the merits of the controversy than to direct the reinstatement of the canceled entry. When that has been done the case must be adjudicated anew.

There is on file in the record a supplemental certificate of the surveyor-general, dated January 22, 1901, from which it appears that there are more than \$500 worth of improvements on the claim, but it does not appear when these improvements, except the discovery shaft embraced in the original certificate at the value of \$250, were made; whether before or after the expiration of the period of publication of notice of the application for patent upon which the entry was allowed. The facts with respect to this matter should be shown.

If the protestant shall desire to attack the entry after its reinstatements, upon the question of the sufficiency of the improvements, or upon any other matter not herein determined against him, he will be permitted to do so upon compliance with the rules and regulations usually applicable to protests against mineral entries. His protest filed April 24, 1900, is hereby dismissed.

FOREST RESERVE—SETTLEMENT—ACT OF MARCH 3, 1899.

JOSHUA L. SMITH.

The act of March 3, 1899, relating to lands in the Black Hills forest reservation, did not abrogate and annul that portion of the executive order creating said reservation which prescribed what lands are excepted from the operation of that order, but merely provided that entries might be made so as to include the improvements of settlers regardless of legal subdivisions of the land.

Lands within said reservation which at the date of the executive order creating the same were covered by a valid settlement for which filing was not made within three months after the filing of the township plat do not come within the exception mentioned in said executive order and are therefore not subject to entry under said act of March 3, 1899.

Acting Secretary Ryan to the Commissioner of the General Land Office, August 5, 1901. (S. V. P.) (A. S. T.)

On December 13, 1900, Joshua L. Smith filed his application to make homestead entry for the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 9, the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 16, and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 15, T. 3 S., R. 5 E., B. H. M., Rapid City land district, South Dakota. The application was rejected by the local officers, and Smith appealed to your office, where, on April 12, 1901, a decision was rendered affirming the action of the local officers, and from that decision Smith has appealed to the Department.

The land in question is embraced within the boundaries of the Black Hills forest reservation, created by executive order of February 22, 1897 (29 Stat., 902), enlarged by executive order of September 19, 1898 (30 Stat., 1783). The executive order creating the reservation reserves the lands therein described from disposition under any of the public land laws, but with the following exception:

Excepting from the force and effect of this proclamation all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States land office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing has not expired.

Smith, in order to show that he comes within said exception, filed with his application his affidavit alleging that he made actual settlement and established residence on the land in August, 1875, and has resided there ever since, and that he has placed thereon about eight hundred dollars' worth of improvements.

The statutory period within which to file his claim of record had not expired at the time of the issuance of the President's proclamation, because at that time the township plat of survey had not been filed, and he was entitled to the full period of three months after the filing of the plat of survey in the local office within which to make his entry. But the plat was filed on April 10, 1900, and he failed to file his application for the entry until December 13, 1900, more than seven months after the filing of the plat, so that it can not be said that he comes within the exception mentioned in the executive order.

It is insisted, however, that by the act of March 3, 1899 (30 Stat., 1095), he is entitled to make the entry regardless of whether he filed his application during the statutory period of three months after the filing of the plat or not.

The act in question provides—

That any person who made actual bona fide settlement and improvement, and established residence thereon in good faith for the purpose of acquiring a home, upon lands more valuable for agriculture than for any other purpose, within the boundaries of the Black Hills Forest Reservation, in the State of South Dakota, prior to September 19, 1898, may enter, under the provisions of the homestead law, the lands embracing his or her improvements, not to exceed one hundred and sixty acres; and

if the lands are so situated that the entry of a legal subdivision, according to existing law, will not embrace the improvements of such settler or claimant, he or she may make application to the Surveyor General of the State of South Dakota to have said tract surveyed, at the expense of the claimant, by metes and bounds, and a plat made of the same and filed in the local land office, showing the land embraced in his original settlement which he desires to enter, not to exceed one hundred and sixty acres, and thereupon he shall be allowed to enter said land as per said plat and survey as a homestead.

It was not the purpose of this statute to abrogate and annul that portion of the executive order which prescribed the conditions upon which lands within the boundaries of the reservation might be excepted from the operations of the order, but merely to provide that entries might be made so as to include the improvements of settlers regardless of legal subdivisions of the land; but such entries must be made "under the provisions of the homestead law."

One of the provisions of the homestead law is that a settler on the public land must file his claim within three months after making his settlement, or, if the land be unsurveyed at the time of his settlement, then in three months after the filing in the local office of the township plat of survey (21 Stat., 140), and the failure of the settler to observe and comply with that provision is fatal to his claim in the presence of an adverse claim.

In this case there is no individual adverse claimant, but the government, by its Chief Executive, has claimed all the land within the boundaries of said reservation for a specific purpose, excepting only the lands coming within the above category; and the executive order, reserving the land for a specific public purpose, must be held to be at least as effective upon the claims of settlers as would be the adverse claim of one who wished the land for his own use.

Smith, having failed to file his claim within the statutory period so as to come within the exception fixed by the executive order, and not having complied with that provision of the homestead law, is not now entitled to make said entry.

Your said decision is therefore affirmed, and the application is rejected.

MINING CLAIM—APPLICATION—PRACTICE.

FOX *v.* MUTUAL MINING AND MILLING CO.

A tract of land included in a pending application for patent to a mining claim can not properly be included in the subsequent application of another party.

Where an application for patent to a mining claim is abandoned as to a tract of land included therein, or rights thereto obtained by earlier proceedings under the application have been waived by delay to duly prosecute the same to completion, the application should, as to such tract, be rejected.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office, August 5, 1901.* (E. B., Jr.)

It appears in this case that the Mutual Mining and Milling Company

filed application May 4, 1893, for patent to the Mollie Gibson lode mining claim, survey No. 8182, Pueblo, Colorado, land district, and was allowed to make mineral entry No. 2278 therefor December 28, 1899, excluding therefrom, however, with certain other ground, that embraced in the Camilla claim, survey No. 8077.

March 10, 1900, the said company filed a petition stating that a certain part of the excluded ground embraced in the Mollie Gibson-Camilla conflict and described by metes and bounds in such petition, was excluded from its proceedings for patent "by inadvertence and error"; that the same is now and at all times has been in the possession and occupancy of petitioner; "and that it intends in good faith to hold, occupy, possess and use the same as mining premises and as a part and parcel of the said Mollie Gibson lode": Wherefore it was prayed "that all proceedings referring to the issuing of patent, pursuant to said final entry of your petitioner for said Mollie Gibson lode, may be stayed and held in abeyance and that meantime your petitioner may be authorized, directed and empowered to make supplemental application for the said parcel of ground so excluded by mistake and excusable neglect." This petition was considered in the decision of your office dated June 20, 1900, wherein it was said:

An examination of the records of this office shows that said described tract is within the said Camilla claim and also within the Hobo claim, mineral survey No. 8380. The Camilla was patented August 1, 1894, and excluded all conflict with said Hobo claim. The Hobo was patented February 17, 1899, exclusive of its conflict with the Mollie Gibson claim.

As it appears that the above claimant company has acted in good faith, and is entitled to the tract above described, it will be allowed 60 days from receipt of notice within which to file supplemental application to purchase, describing by metes and bounds the additional tract desired. As neither the Camilla or Hobo were excluded from the application to patent and the published notices, it will not be necessary to amend said application or to republish same.

Upon receipt of the amended application hereby allowed an amended survey will be ordered to describe said tract.

The company having filed, July 19, 1900, its so-called supplemental application to purchase the ground described in its petition, the same was considered in the decision of your office dated August 9, 1900, wherein it was said:

As the Camilla was excluded from the published notice of the Mollie Gibson claim, it will be necessary for the claimant company to make supplemental publication for said tract and post the notices as in the first instance. Upon receipt of proof of said publication and posting in this office, an amended survey will be required.

March 25, 1901, James Fox, as owner of the Zenda lode mining claim, survey No. 14460, filed his protest against the allowance of the said supplemental application to purchase, alleging that the record discloses that the applications and entries for the said Hobo, Camilla, and Mollie Gibson lode mining claims, respectively, excluded and waived all claim to the ground common to the location and survey of each of them, and

that such ground is embraced in the valid and subsisting location of the Zenda claim for which application for patent is about to be filed: Wherefore he protests against the allowance of such supplemental application of said company for "ground which has never been published."

By decision of your office dated March 30, 1901, it was found that the tract described in the petition of said company, and which it now seeks to have included in its said entry No. 2278 as part of the Mollie Gibson claim, is a tract embraced within the lines of survey No. 8182, the Mollie Gibson, of survey No. 8077, the Camilla, and of survey No. 8380, the said Hobo; but that it was excluded from the patents for the Camilla and Hobo claims, dated August 1, 1894, and February 17, 1899, respectively, and, so far as shown by the records of your office, was vacant land; and that it was embraced in the application and notices for the Mollie Gibson claim; and it was therefore held, in effect, that the Mollie Gibson entry might be amended so as to include such tract without the publication and posting of supplemental notice as required by said decision of August 9, 1900; and the said protest was at the same time dismissed. From said decision of March 30, 1901, Fox has appealed to the Department, assigning errors of fact and of law therein.

The facts appear to be as found in the last mentioned decision except as to the said tract being embraced in the notices of the Mollie Gibson application for patent. Such application and the notice thereof posted on the claim by their terms embraced that tract making no exclusion of any ground whatever, but the published notice and that posted in the local office excepted and excluded "all conflicts with . . . survey No. 8077, Camilla lode," which was covered by the prior application of the Camilla claimants and the notices of which were then running.

The survey of the Camilla, as also the application for patent and the notices thereof embraced and included the tract in question, which was therefore, as ground covered by a prior application and notice, improperly included in the Mollie Gibson application and the notice thereof posted on the claim, and properly excluded from all subsequent proceedings for patent to the Mollie Gibson claim. That it was excluded from such proceedings is expressly admitted by the company's said petition, the object of which was to secure permission from the land department to make supplemental application for patent to the tract and have its entry, as theretofore made, remain in temporary abeyance with a view to amending the same to include that tract in the event the supplemental proceedings concerning the same should result successfully.

The application for patent to the Hobo claim was not filed until November 9, 1895, long subsequent to the filing of the Camilla and

Mollie Gibson applications, and the Hobo application and the notices thereof expressly exclude all conflict between that claim and "Survey No. 8182," the Mollie Gibson, which survey, embracing and including the tract described in the said petition, the same was duly excluded from all the proceedings in the Hobo claim, including, as already stated, the patent therefor.

For reasons not necessary to recite, the conflict then existing between the Camilla claim and the said Hobo, then not yet surveyed, embracing the tract here in question, was expressly excepted and excluded from the Camilla entry made June 15, 1893, and so, as stated, was not included in the patent to that claim. The tract does not therefore appear ever to have been properly embraced in any application except that of the Camilla claimants, and they having either abandoned their application as to that tract, or by the long delay waived all rights thereto obtained by the earlier proceedings under the application, the same should be and hereby is, as to such tract, rejected.

This leaves the tract free from any application for patent and subject to application therefor by any proper party.

All the proceedings by your office upon the said petition are hereby vacated and held for naught, and you will in due course take up and consider, *de novo*, the said petition.

You will give due notice hereof to the Camilla claimants as well as to the said company.

REGULATIONS CONCERNING OPENING OF WICHITA AND KIOWA,
COMANCHE AND APACHE CEDED LANDS.

REGULATIONS.

Acting Secretary Ryan to W. A. Richards, Assistant Commissioner of the General Land Office, El Reno, Oklahoma Territory, August 5, 1901.

The following regulations are hereby prescribed for the purpose of carrying into full effect the opening of the ceded Wichita and Kiowa, Comanche and Apache lands provided for in President's proclamation of July fourth, last:

First. Applications either to file soldiers' declaratory statement or make homestead entry of these ceded lands must, on presentation, in accordance with proclamation opening said lands to entry and settlement, be accepted or rejected, but local officers may, in their discretion, permit amendment of a defective application during the day only on which same is presented.

Second. No appeal to General Land Office will be allowed or considered unless taken within one day, Sundays excepted, after the rejection of the application.

Third. After presentation of an application and until same is finally disposed of, either by failure to appeal or until notice of decision by Secretary of the Interior where an appeal is taken, lands covered thereby shall be reserved from other disposition.

Fourth. Where an appeal is taken the papers will be immediately forwarded to the General Land Office, where they will be at once carefully examined and forwarded to the Secretary of the Interior with appropriate recommendation, when the matter will be promptly decided and closed.

Fifth. These regulations will supersede, during the sixty days from the opening of these ceded lands, any rule of practice or other regulation governing the disposition of applications with which they may be in conflict, and will apply to all appeals taken from the action of the local officers during said period of sixty days.

Sixth. The purpose of these regulations is to provide an adequate and speedy method of correcting any material errors in local offices, and at the same time to discourage groundless appeals and put it out of the power of a disappointed applicant to indefinitely tie up the land or force another to pay him to withdraw his appeal.

Give all possible publicity, through the press and otherwise, to these regulations.

AMENDMENT OF REGULATIONS OF AUGUST 5, 1901, CONCERNING
OPENING OF WICHITA AND KIOWA, COMANCHE AND APACHE CEDED
LANDS.

REGULATIONS.

Acting Secretary Ryan to W. A. Richards, Assistant Commissioner of the General Land Office, El Reno, Oklahoma Territory, August 6, 1901.

Referring to telegraphic regulations of yesterday, you will substitute the following in lieu of paragraph three thereof:

After rejection of an application, whether an appeal be taken or not, the land will continue to be subject to entry as before, excepting that any subsequent applicant for the same land must be informed of the prior rejected application and that the subsequent application, if allowed, will be subject to the disposition of the prior application upon the appeal, if any is taken from the rejection thereof, this fact must be noted upon the receipt or certificate issued upon the allowance of the subsequent application.

MINING CLAIM—PLACER—SURVEY.

MARY DARLING PLACER CLAIM.

"The general law governing the survey and subdivision of the public lands makes the same and the quantity of land as stated therein, when duly returned and approved, conclusive for the purpose of the disposal of the lands; and the returns of the surveyor-general in surveys of mining claims made under the mining laws are to be taken, likewise, as conclusive, as to the quantity of the lands embraced in such claims.

Where the certificate of entry of a placer mining claim describes the land in terms of the general public survey and the surveys of the excluded mining claims, such description is sufficiently accurate therein, and said surveys, taken together, furnish the necessary data for the computation of the area of the land and for the preparation of an accurate description to be incorporated in the patent.

Departmental decision in the case of *Albert B. Knight et al.*, 30 L. D., 227, overruled.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) *August 8, 1901.* (E. B., Jr.)

It appears in this case that Alonzo Frizzell made mineral entry No. 2504, October 2, 1900, for the Mary Darling placer mining claim, Pueblo, Colorado, land district, describing the same in the final certificate as the $W.\frac{1}{2}$ of the $NE.\frac{1}{4}$, the $W.\frac{1}{2}$ of the $SE.\frac{1}{4}$ of the $NE.\frac{1}{4}$, and the $W.\frac{1}{2}$ of the $E.\frac{1}{2}$ of the $SE.\frac{1}{4}$ of the $NE.\frac{1}{4}$ of Sec. 35, T. 14 S., R. 70 W., Sixth P. M., but "*expressly excepting and excluding . . . all that portion of the ground embraced in mining claims or surveys designated as Lots No. 12646, Granite Mountain, and 13745, Bluff lodes, . . . said placer claims, as entered, embracing 94.445 acres.*" Of the above lode claims patent issued for the latter March 1, 1901, upon mineral entry No. 2480, and the former is embraced in mineral entry No. 2606, which was approved for patenting June 26, 1901.

As shown by the public survey of said section 35, approved January 23, 1878, which is the only official survey thereof, the $NE.\frac{1}{4}$ of the section, in which quarter the Mary Darling placer as entered is situated, is a regular quarter section containing one hundred and sixty acres. By reason of the approved surveys of the said lode claims that part of the quarter section containing the Mary Darling placer is divided, as shown by a segregation diagram prepared in the office of the surveyor-general and certified by that officer to be correct under date March 14, 1901, into two parts, and, as also shown by such diagram, the larger of these parts is penetrated by another lode mining claim known as the Agnes, survey No. 11624. Apparently, however, no application has been made for patent to the last named claim, and the conflict between the same and the Mary Darling placer has, upon the record before the Department, been properly embraced in the entry for the latter.

According to the said diagram the said section 35 and the $NE.\frac{1}{4}$ thereof—instead of being squares containing six hundred and forty,

and one hundred and sixty acres, respectively, as officially surveyed and platted—are represented as being quite irregular in form and acreage, and to contain, respectively, an excess over the regular acreage. The NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ is described in the said diagram as lot 2 and represented to contain an area of 44.53 acres, after deducting therefrom several acres embraced in said survey No. 11624; the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ is described, likewise, as lots 7 and 8 and represented to contain 36.15 acres exclusive of nearly the whole of the said Granite Mountain claim; and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ as lots 9 and 20, containing 25.22 acres exclusive of the E. $\frac{1}{2}$ of the E. $\frac{1}{2}$ thereof, and the conflict with the said Bluff claim comprising about half the area of that claim.

Considering the situation disclosed by the record, your office, by decision of May 9, 1901, required the claimant, within sixty days from notice, to apply to the surveyor-general for a survey of the Mary Darling claim, on the ground that the land embraced therein “consists of irregular tracts in said section, and the same are not capable of description in a patent with such mathematical accuracy as should be contained in such an instrument,” citing the case of Holmes Placer (26 L. D., 650). The claimant thereupon, pointing out the inapplicability of the Holmes Placer case to this case, requested that the description of the land be changed in the final certificate to conform to that given in the segregation diagram and that patent issue thereon accordingly. The request was denied by decision of your office, dated July 3, 1901, and the requirement of the previous decision was adhered to. From these decisions claimant has appealed to the Department.

Your office properly declined to change the description in the said final certificate to conform to the description of the land as given in the said segregation diagram. Such diagram and the lottings of the land shown thereon are not made from an official survey of the lotted land, but are apparently based upon data reported in, or in connection with, the surveys of mining claims by deputy mineral surveyors. As was very pertinently said in the said decision of your office, dated July 3, 1901—

The danger of accepting such a segregation diagram as the basis for the issuance of patent on the Mary Darling placer, finds an illustration in the segregation diagram itself when it is compared with another purported segregation survey diagram of the same section, which was certified by the Surveyor-General on January 15, 1901, and which came to this office, with his letter of the same date. Said last mentioned segregation survey, while dividing the NE. $\frac{1}{4}$ of Sec. 35 into the same numbered lots as that of the segregation of March 14, 1901 (and except as to lot 1, for the same reasons), gives the area of lot 2 as 43.96 acres, of lot 7 as 9.67 acres, of lot 8 as 26.90 acres, of lot 9 as 25.27 acres, and of lot 20 as 1.82 acres, each of said lots so shown on the one diagram it will be seen differing in area from that shown on the other, yet each of the said diagrams is certified to be correct by the Surveyor-General.

The confusion and conflicts certain to arise as to the *loci* of lands if patents should issue thereto from time to time describing the different

tracts, some according to data taken from one such diagram and some according to data taken from another, need not be dwelt upon.

The land as already stated was surveyed in 1878, and the said NE. $\frac{1}{4}$ was returned by the surveyor-general as containing one hundred and sixty acres and each quarter thereof as containing forty acres, and there has been no other official survey thereof, except as to the portions embraced in surveyed mining claims. The general law governing the survey and subdivisions of the public lands makes the same and the quantity of land as stated therein, when duly returned and approved, conclusive for the purposes of the disposal of the lands. See sections 2395 and 2396, Revised Statutes; and *Mason v. Cromwell*, 26 L. D., 369, 371. The mining laws make special provision for the survey of lode mining claims, and for placer claims not on surveyed lands, or which cannot be conformed to legal subdivisions, and the return of the surveyor-general as to the quantity of land embraced therein is to be taken, likewise, as conclusive (sections 2325, 2327, 2329, 2330, and 2331, Revised Statutes). The said placer claim appearing to have been duly located in March, 1900, according to the proper legal subdivisions of the land as surveyed in 1878 under the general law, such survey and the surveys of the Granite Mountain and Bluff lode claims are therefore to be taken together and to be followed in determining both the proper description and the acreage of the land embraced in Frizzell's entry. No part of survey No. 11624, the Agnes claim, being excluded from Frizzell's proceedings for patent, it is not necessary to consider that survey.

It is true the plats and field notes of the surveys of the Granite Mountain and Bluff lode claims on file in your office were made for private parties other than the Mary Darling claimant, and are filed there as parts of the record in those cases, respectively. They are none the less official in character, however, because so made and filed, and are now part of the permanent official records of your office, and proper to be resorted to upon any question whereon they have bearing arising in any case before the land department.

The description of the land embraced in Frizzell's entry, as herein first above given from the final certificate, being expressed in terms of the general public survey and the surveys of the excluded mining claims, it is believed that such description is sufficiently accurate therein; and that said surveys, taken together, furnish all the data necessary to enable your office to correctly compute the area of the land, and also to prepare therefrom an accurate description of the land to be incorporated in a patent.

The said decisions of your office are modified accordingly; and so much of the decision of the Department in case of *Albert B. Knight et al.* (30 L. D., 227) as is in conflict with the view herein expressed is hereby overruled.

REGULATIONS OF AUGUST 5, 1901. CONCERNING OPENING OF WICHITA AND KIOWA, COMANCHE AND APACHE CEDED LANDS, AMENDED.

REGULATIONS.

Acting Secretary Ryan to W. A. Richards, Assistant Commissioner of the General Land Office, El Reno, Oklahoma Territory, August 14, 1901.

Referring to telegraphic regulations of the fifth instant, the following additional rule is prescribed, the same to be numbered four and a half:

Applications to contest entries allowed for these lands filed during the sixty days from date of opening will also be immediately forwarded to the General Land Office, where they will be at once carefully examined and forwarded to the Secretary of the Interior with proper recommendation when the matter will be promptly decided.

PRACTICE—CONTINUANCE—DEPOSITIONS—INTERROGATORIES.

WESTERVELT v. JOHNSON.

It is not essential that the interrogatories required by Rule 24 of Practice be filed with an application for continuance and order to take depositions, made under Rule 21; it is sufficient that the interrogatories be prepared with reasonable diligence.

Acting Secretary Ryan to the Commissioner of the General Land Office, August 14, 1901. (S. V. P.) (J. R. W.)

Caroline E. Johnson appealed from your office decision of January 17, 1901, holding for cancellation her homestead entry made April 12, 1898, for the SW. $\frac{1}{4}$ of Sec. 28, T. 133 N., R. 52 W., Fargo, North Dakota.

October 21, 1899, Elbert Westervelt initiated contest against the entry, alleging failure to establish residence or to build on said tract, and abandonment for more than six months prior thereto, not due to military or naval service for the United States.

November 3, notice was personally served on the entrywoman, in Richland county, North Dakota, for hearing December 11, 1899. On that day plaintiff appeared with his witnesses and defendant by attorney, who filed affidavits of defendant and others for a continuance for thirty days because of sickness of material witnesses whose attendance could not then be obtained, and the hearing was continued to January 15, 1900.

January 15, 1900, plaintiff with witnesses and counsel attended, defendant appeared by counsel and asked a continuance for sixty days, upon the affidavit of counsel and her two sons that she had long been

in ill health, and, December, 1899, was obliged to go to Belleville, Ohio, to a specialist for treatment, intending to return for the hearing. January 4, 1900, counsel wrote her to send the affidavit of her physician, if unable to return, but his letter was returned unclaimed, and he learned too late to communicate before the hearing that she had become more afflicted and had gone to her son's home in Kansas City, Missouri. Since coming to Fargo he had learned that her sickness becoming more aggravated she had gone to her son's home at Mansfield, Texas; that he could not safely go to trial in her absence, and if the hearing were continued sixty days he believed it possible to procure her attendance. If present she would testify that:

She in good faith established her residence upon the tract herein involved, and that she never abandoned the said tract since the date of establishing her residence, and that she has made valuable improvements upon the tract; that her absence was not due to her act, procurement, or consent, but entirely to her physical condition.

The motion was overruled, and contestee moved for a sixty days' continuance and order to take deposition of the contestee under Rule 21 of Practice, which was denied; counsel excepted, and the trial proceeded. This ruling was assigned for error on appeal to your office and is so assigned on appeal to the Department. Your office decision appears to hold that such motion was properly overruled, on the ground that "no interrogatories were served or filed with the application." This is assigned for error by counsel, who insist that Rule 24 for filing interrogatories does not apply "as a condition *sine qua non*" to motions for continuance under Rule 21, and that mere failure to file interrogatories with the motion does not justify denial of a motion for continuance under that rule. In this respect, in opinion of the Department, counsel's contention is correct.

Rule 21 is intended as a restriction upon repeated applications for continuance on the ground of absence of material witnesses, as an evidence of good faith, and to compel the taking of testimony by deposition, if, after one adjournment, a witness is absent. Such absence is often a surprise to the party and counsel. It is too severe a rule to require counsel after one continuance to be prepared with interrogatories for taking depositions of every intended witness, so as to comply with Rule 24, for the emergency liable to arise by absence of a material witness. If the application is meritorious under Rule 21, the filing of interrogatories cannot be held an essential condition. It is sufficient that interrogatories, in such case, be prepared with reasonable diligence and the taking out of commission to take depositions under Rules 23 and 24 be thereafter proceeded with.

The local officers appear to have denied the application upon its merits, and not on the ground that interrogatories were not filed. The application was without merit. It did not negative lack of other known witnesses by whom the same facts could be proved, nor that

the application was not for delay merely; nor did it state facts to which contestee would testify, but mere conclusions. It was therefore properly denied on its merits.

Contestee's two married daughters lived near to the land and her two sons on a farm owned by her at a few miles distance. The facts on which she bases her claim of residence were fully proven by witnesses produced in her behalf. She had been on the tract about a week in June, also September 5th and 6th, and one night November 2, 1898, two nights June [2 and] 3, and briefly September, 1899. Except these visits, there is no evidence of her being there. She resided with her children, and most of the time upon her own farm carried on by her sons. There was a barn on her claim, and against the side of it was a lean-to or shanty, not habitable except in moderate weather. The finding of the local office and decision of your office that defendant had never established residence on her claim is the only conclusion that could be sustained upon the evidence. The evidence upon her claim of physical inability to live on the land is insufficient to excuse her failure to establish residence.

Your office decision as to the merits is affirmed.

MINING CLAIM—EXPENDITURE.

CLEVELAND ET AL. v. EUREKA No. 1 GOLD MINING AND MILLING Co.

Questions as to the making of annual expenditure upon mining claims and as to relocations alleged to have been made by reason of failure to make such expenditure or to duly resume work, are not for determination by the land department but by the courts.

Where an applicant, after the close of the period of publication of notice, delays making entry until beyond the end of the calendar year, his laches, in the presence of the alleged relocation of the claim, are fatal to the entry.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) *August 14, 1901.* (E. B. Jr.)

February 17, 1900, the Eureka No. 1 Gold Mining and Milling Company filed its application for patent (No. 110, Colville Series) to the Eureka lode mining claim, survey No. 503, Spokane Falls, Washington, land district. No adverse claim was filed during the period of publication of notice of the application, which period expired April 24, 1900. January 3, 1901, the company made mineral entry No. 109 for the claim.

January 4, 1901, E. R. Cleveland filed in the local office a "protest and adverse claim" against the issue of patent to said company for said claim, alleging that the company had failed to perform the annual assessment work thereon for the year 1900, and that on the first day of

January, 1901, the ground being then vacant and abandoned, he had relocated it as the Gold Eagle lode claim and was in actual possession thereof and working the same. Such protest and adverse claim was rejected by the register the same day "for the reason that it was not offered within the sixty days period of publication of notice of application for patent of the Eureka lode;" and therefrom said Cleveland appealed to your office.

January 31, 1901, E. D. Carpenter likewise filed a protest in behalf of himself and others, containing allegations similar in every respect to those made by Cleveland, except that on said first day of January himself and his co-locators had relocated, as the Hecla lode claim, the ground theretofore embraced in the said Eureka claim; and also that said company "had not on the first day of January filed the certificate of the surveyor general to the effect that \$500 worth of work had been performed or development done upon or for said claim . . . as required by law, nor at all"; and that "no notice was kept posted upon said so-called Eureka lode claim during the period of publication of notice of application for patent, nor for any time to exceed ten days of said period." Said Carpenter also filed a duplicate of his protest in your office, February 6, 1901. The allegations of Carpenter's protest as to failure of said company to perform assessment work during 1900, as to failure to keep notice posted on the claim during the period of publication, and as to failure to file a certificate of the surveyor general showing expenditure of \$500 on or for the claim, were corroborated by the affidavits of two persons; and as an exhibit in support of protest filed in the local office there was attached thereto a duly certified copy of the location notice, dated January 1, 1901, of the Hecla lode claim.

February 9, 1901, J. M. Nelson, alleging himself to be one of the locators of the Hecla claim, also filed a corroborated protest against the issuance of patent to said company for the Eureka claim, containing substantially the same allegations as Carpenter's protest, except as to the matter of \$500 expenditure, concerning which nothing was said therein.

By decision dated March 30, 1901, your office sustained the rejection of Cleveland's adverse claim, and considering the same as a protest, together with the other said protests, dismissed them all, finding that the surveyor general's certificate showing an expenditure of \$500 in labor or improvements upon the Eureka claim had been duly filed February 17, 1900, and that notice of the application for patent thereto had been duly posted on the claim for the period required by the statute; and holding that the question whether annual assessment work for the Eureka claim had been duly performed for the year 1900, and whether the ground had been duly relocated as alleged in the protests of Carpenter and Nelson were not questions for the land

department, but for the courts, and that the company's delay in not sooner completing its application and making entry of its claim did not amount to laches. From said decision protestants Carpenter and Nelson have appealed to the Department.

Your office properly held that the questions herein as to the performance of annual expenditure and as to the alleged relocations are not for determination by the land department but by the courts (*Cain et al. v. Addenda Mining Company*, on review, 29 L. D., 62; *P. Wolenberg et al.*, Id. 302; and *Barklage et al. v. Russell*, Id. 401). The Department cannot concur, however, in the views expressed in the decision of your office upon the question of laches on the part of the applicant for patent. The provisions of the mining laws relative to the patenting of mining claims, as construed by the Department, contemplate and require that an applicant for patent shall proceed with diligence to complete his application. In this instance the applicant, apparently of his own volition, delayed making entry for a period of more than eight months after the close of the period of publication of notice and until beyond the end of the calendar year; and the Eureka claim may have been, as alleged by the protestants, open to relocation and have been relocated by them, by reason of the failure of the applicant company to make the necessary annual expenditure, or to resume work thereon after such failure and before such alleged relocation. As was said by the Department in the case of *P. Wolenberg et al.*, *supra*, page 305:

The assumption, declared in section 2325 of the Revised Statutes, that no adverse claim exists in those instances where no adverse claim is filed in the local office during the period of publication, relates to the time of the expiration of the period of publication and to adverse claims which might have been made known at the local office before that time. It has nothing to do with adverse claims which are initiated subsequent to that time and which could not therefore have been made known at the local office during the period of publication. The statutory declaration does not compel any assumption in this instance to the effect that no adverse claim intervened between the earlier proceedings upon the application for patent, which ended February 3, 1897, and the making of the entry on December 21, 1898. In the presence of the claimed relocation of the Mascot after the expiration of the period of publication, the applicants for patent are not in a position to ask or urge that their laches or delay be disregarded. It follows that the entry must be canceled.

It is asserted by counsel for the company in his brief in answer to protestants' appeal that:

On the afternoon of December 31st, 1900, defendant company, by its president and attorney, Jno. I. Melville, appeared at the local land office in Spokane Falls, Washington, and tendered to the receiver thereof the sum of ninety dollars, the amount necessary to enter said Eureka lode claim. That in consequence of that day being the last day of the year, and the time of day late in the afternoon, although during ordinary business hours, defendant company did not at that instant, through courtesy and in consideration of the fact that land office officials as well as other persons are usually busy winding up the year's business and closing books for the year past, insist on issuance of receiver's receipt, but that the said sum of

ninety dollars was voluntarily left by said defendant, in said land office, with the understanding that receiver's receipt therefor would issue in due course of business. Had protestants taken even reasonable precaution to fully advise themselves as to the status of the application and entry, they could undoubtedly have obtained full information as to the above facts, and their consequent ineffectual re-location of the said lode claim on January 1st, 1901.

Counsel's evident purpose in making the above statement is to suggest that there was such a tender of payment December 31, 1900, for the land embraced in the Eureka claim as to have entitled the company to make entry thereof on that day and that it was the duty of the local officers to have so allowed it, and therefore the entry is to be regarded in law as made on that day instead of on the actual date of the certificate, January 3, 1901.

However that might be in a case where the proofs were otherwise complete, such contention cannot be sustained herein for the reason that certain necessary proofs—the proof of publication of notice, proof of continuous posting of notice on the claim, and the abstract of title to the claim—had not been filed at the time of the alleged tender, and were not filed until January 3, 1901. Entry of the Eureka claim could not therefore have been allowed prior to the last mentioned date.

It follows from what has been said that the applicant did not, in the face of the alleged relocations, use due diligence in the prosecution of its application for patent. The said protests amount to the assertion of claims adverse to that of the applicant and arising subsequent to the period of publication. There has been, therefore, no opportunity for the assertion of such claim in the manner provided by section 2326 of the Revised Statutes for adverse claims arising prior to that period. In the presence of protestant's allegations of relocation the applicant for patent is not in a position to ask, nor the Department to grant, that its laches be disregarded. See the cases cited above.

The entry will be canceled. The claimant will be at liberty to renew its proceedings for patent, and if this is done protestants will be afforded an opportunity to have their alleged adverse claims determined by the proper tribunal. It is not necessary to consider any other question in the case. The decision of your office is modified accordingly.

INDIAN LANDS—COMMISSIONS—ACT OF JANUARY 14, 1889.

INSTRUCTIONS.

All moneys accruing from the disposal of agricultural Chippewa lands under the provisions of the acts of January 14, 1889, and January 26, 1901, either for excess acreage or on commuted entries, should be deposited to the credit of the Chippewa Indians.

The register and receiver are not entitled to commissions upon such moneys either payable therefrom or out of the public moneys of the United States; but under the third paragraph of section 2238 of the Revised Statutes they are entitled to the commissions therein specified upon the price of the land embraced in entries, as excess acreage, and land involved in commuted entries, the same to be paid by the entrymen.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) *August 17, 1901.* (J. H. F.)

The Department is in receipt of your office letter of July 30, 1901, requesting instructions as to whether moneys received at the Crookston local land office, in payment of certain agricultural Chippewa Indian lands in the State of Minnesota, upon which homestead entries had been made under act of January 14, 1889 (25 Stat., 644), and thereafter commuted in pursuance of the provisions of the act of January 26, 1901 (31 Stat., 740), together with moneys received in payment of the excess acreage embraced in certain of said entries, should be deposited to the credit of the Chippewa Indians or to the credit of the United States as public moneys, and also whether the register and receiver are entitled to commissions on such commutation and excess moneys, and, if so, from what moneys such commissions should be paid.

By the act of January 14, 1889, *supra*, provision was made for the acquirement of certain lands in Minnesota, by cession and relinquishment, from the Chippewa Indians, and it was therein provided that the agricultural lands in question, when so acquired, should be disposed of to actual settlers only under the provisions of the homestead law, and each settler was required to pay for the land entered the sum of one dollar and twenty-five cents per acre, in five equal annual payments, and was to be entitled to patent only upon proof of full payment of said sum and upon due proof of occupancy of said land for the period of five years; and it was further provided—

that all money accruing from the disposal of said lands in conformity with the provisions of this act shall, after deducting all the expenses of making the census, of obtaining the cession and relinquishment, of making the removal and allotments and of completing the surveys and appraisals in this act provided, be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund, which shall draw interest at the rate of five per centum per annum, payable annually for the period of fifty years, after the allotments provided for in this act have been made, and which interest and permanent fund shall be expended for the benefit of said Indians in manner following.

Subsequently, by act of May 17, 1900 (31 Stat., 179), known as the free homestead act, provision was made whereby all settlers under the homestead laws, upon agricultural public lands which had theretofore been opened to settlement and acquired by treaty or agreement from the various Indian tribes, who had resided or should thereafter reside upon the tract entered for the period required by existing law,

shall be entitled to a patent for the land so entered "upon payment to the local land officers of the usual and customary fees," and no other or further charge of any kind whatsoever was to be required from such settler to entitle him to a patent for the land covered by his entry; but it was therein provided, however—

that all sums of money so released which if not released would belong to any Indian tribe shall be paid to such Indian tribe by the United States.

By the act of January 26, 1901, *supra*, the provisions of section 2301 of the Revised Statutes, authorizing settlers to commute their homestead entries, were extended to all homestead settlers affected by or entitled to the benefits of the free homestead act, *supra*, but it was therein provided "that in commuting such entries the entryman shall pay the price provided in the law under which original entry was made."

It will be noted that the original act of 1889, authorizing a disposition of the lands in question, exacted payment therefor by homestead entrymen, and it was expressly provided that all money accruing from the disposal thereof, after deducting the expenses therein specified, should be placed to the credit of the Chippewa Indians as a permanent fund for their benefit. By the terms of the subsequent act of May 17, 1900, all entrymen who perfected title to any of said lands, by compliance with the provisions therein specified, were released from making payment for the land, and all sums of money, the payment of which was so released and which otherwise would have been placed to the credit of the Indians in pursuance of the provisions of the act of 1889, *supra*, were required to be paid to such Indians by the United States; but by the terms of the act of January 26, 1901, all entrymen who did not see fit to comply with the conditions specified in the act of 1900, *supra*, releasing them from making payment for the land, and who elected to commute their entries as therein authorized, were required, in commuting such entries, to pay for the land the price originally exacted therefor by the act of 1889, *supra*.

It will be further noted that the provisions of the three acts hereinbefore referred to all, in some measure, affect and pertain to methods of disposition of the lands in question, and, for purposes of construction, the provisions of the acts of May 17, 1900, and January 26, 1901, should be read and considered as amendments to the original act of 1889 in so far as its provisions are affected thereby, and, when so considered and read, it is evident that all moneys received in payment of the lands in question, either for excess acreage or on commuted entries, should be placed to the credit of the Chippewa Indians in accordance with the provisions of the act of 1889, *supra*. The act of May 17, 1900, only operated to release entrymen from payment for that part of said lands, title to which was perfected under the provisions prescribed in that act, and to that extent only was payment to the Indians

thereby directly assumed by the United States. It nowhere appears that Congress, by the act of 1900, *supra*, intended the United States to assume payment directly to the Indians for any of said lands for which payment had theretofore been made or which might thereafter be exacted under other laws or by subsequent enactment, and there is no provision in that act or in the act of 1901, *supra*, which operated to repeal, or which in any manner conflicts with, the general provision contained in the act of 1889, *supra*, requiring all moneys accruing from the disposal of said lands to be placed to the credit of the Indians. The Department is therefore of opinion that the moneys in question should be deposited in accordance with the provisions of the act of 1889, and you are instructed accordingly.

In determining the further question involved in your request, as to whether the register and receiver are entitled to commissions on said moneys, and, if so, from what moneys such commissions are to be paid, it must be noted that, by the provisions of the act of 1889, *supra*, all moneys derived from a disposition of the lands in question, after deducting therefrom the expenses therein specified, were constituted a permanent fund which was thereby created to be held in trust by the United States for the sole use and benefit of the Chippewa Indians, and it was further provided by said act that at the expiration of fifty years said trust fund should be divided and paid to said Indians and their issue then living in equal shares. In the light of these provisions it is quite clear that moneys accruing from the disposal of the lands in question do not, in reality, belong to, and are not in fact received by, the United States in its own right, but only in its capacity as trustee for the Indians, and, under such provisions, it is equally clear that no part of said moneys can be diverted from the trust fund and applied in payment of commissions to the register and receiver. State of South Dakota (22 L. D., 550).

By the second paragraph of section 2238 of the Revised Statutes, relating to compensation of registers and receivers, which is derived from the act of April 20, 1818 (3 Stat., 466), it is provided that said officers shall each be allowed "a commission of one per centum on all moneys received at each receiver's office," but in view of the fact that this provision has been uniformly held (25 L. D., 370) to apply only to moneys received at cash sales of lands, which were the only moneys paid into the receiver's office at date of the act providing such commission, and in view of the further fact that the moneys in question herein were not received by the United States in its own right but in its trust capacity only as aforesaid, the Department is of opinion that the provision contained in the second paragraph of section 2238 of the Revised Statutes is not applicable to moneys accruing from the disposal of the lands referred to and that the register and receiver are not entitled to commissions thereon, under that provision, payable

out of the public moneys of the United States. By the third paragraph of said section 2238 of the Revised Statutes, however, it is provided that said officers shall each be allowed "a commission *to be paid by the homestead applicant*, at the time of entry, of one per centum on the cash price, as fixed by law, of the land applied for; *and a like commission when the claim is finally established and the certificate therefor issued as the basis of a patent.*"

It will be noted that the original act of 1889 provided that the lands in question should be disposed of under the provisions of the homestead law and, in addition thereto, fixed the price of the lands at \$1.25 per acre, which the entrymen were required to pay. By the act of May 17, 1900, entrymen were released from the requirement of making payment for the land, but that act did not operate to release them from payment of the register's and receiver's ordinary compensation as fixed by the third paragraph of section 2238, above quoted, it having been expressly provided in said act that entrymen should pay to the local officers "the usual and customary fees," and there is certainly nothing in the language found in the act of January 26, 1901, which could be construed to relieve entrymen, upon making final commutation proof and receiving a certificate as basis for patent, from making payment to the register and receiver of their compensation as fixed and required to be paid by the last clause of the paragraph to which reference has been made. The provision contained in the act of 1901, *supra*, to the effect that in commuting such entries, entrymen shall pay the "price" provided for in the law under which said entries were originally made, relates solely and exclusively to the price of the *land*, and its only effect was to reimpose upon entrymen, who saw fit to commute their entries, the requirement of paying for the land the price originally fixed therefor by the act of 1889. This provision had no reference whatever to the matter of the local officers' compensation, and did not in any manner operate to affect the other provisions of law hereinbefore referred to requiring such compensation to be paid by such entrymen. The fees and commissions payable by homestead entrymen are in no sense part of the price of the land and are not in the nature of a part of the consideration therefor. "They are required to be paid for the purpose of defraying the expenses incident to the particular manner of disposal in which they are imposed" (2 L. D., 695). You are therefore instructed to the effect that the register and receiver at Crookston are not entitled to commissions upon the moneys in question, either payable out of such moneys or out of the public moneys of the United States, but that, upon the price of the land embraced in said entries, as excess acreage, and upon the price of the and involved in the commuted entries, said officers are, in the opinion of the Department, entitled to the commissions specified in the third paragraph of section 2238 of the Revised Statutes, the same to be paid by the entrymen as therein provided.

In your request for instructions herein reference is made to circular letter of instructions issued under the act of January 26, 1901, *supra*, approved by the Department March 21, 1901, and to a letter addressed by your office to the register and receiver at O'Neill, Nebraska, under date of June 22, 1901, wherein said circular was cited as authority for the ruling therein made, to the effect that entrymen commuting homestead entries made on the ceded Ponca Indian reservation were not required to pay final commissions. An examination of the circular referred to discloses that the language thereof does not warrant the construction apparently placed thereon by your office and that there is nothing therein contained which is in conflict with the views hereinbefore expressed. Your office will be governed accordingly.

SURVEY—SECTION 2401 REVISED STATUTES—ACT OF AUGUST 20, 1894.

WALSH AND O'ROURKE.

Section 2401 of the Revised Statutes as amended by the act of August 20, 1894, does not authorize the survey of fragmentary portions of a township, but authorizes only the survey of entire townships.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office, August 19, 1901.* (E. F. B.)

With your letter of July 29, 1901, you transmit the appeal of T. J. Walsh and John O'Rourke from the decision of your office of May 14, 1901, rejecting their petition for the survey of certain sections in township 31 north, ranges 19 and 20 west, under the deposit system as provided for by the act of August 20, 1894 (28 Stat., 423), amending sections 2401 and 2403, Revised Statutes.

Sections 2401 and 2403, Revised Statutes, as amended by the act of August 20, 1894, read as follows:

When the settlers in any township not mineral or reserved by the government, or persons and associations lawfully possessed of coal lands and otherwise qualified to make entry thereof, or when the owners or grantees of public lands of the United States under any law thereof, desire a survey made of the same under the authority of the surveyor-general, and shall file an application therefor in writing and shall deposit in a proper United States depository to the credit of the United States a sum sufficient to pay for such survey, together with all expenditures incident thereto without cost or claim for indemnity on the United States, it shall be lawful for the surveyor-general, under such instructions as may be given him by the Commissioner of the General Land Office and in accordance with law, to survey such township or such public lands owned by said grantees of the government and make return thereof to the general and proper local land office: *Provided*, That no application shall be granted unless the township so proposed to be surveyed is within the range of the regular progress of the public surveys embraced by existing standard lines or bases for the township and subdivisional surveys.

Sec. 2403. Where settlers or owners or grantees of public lands make deposits in

accordance with the provisions of section twenty-four hundred and one, as hereby amended, certificates shall be issued for such deposits which may be used by settlers in part payment for the lands settled upon by them, the survey of which is paid for out of such deposits, or said certificates may be assigned by indorsement and may be received by the government in payment for any public lands of the United States in the States where the surveys were made, entered or to be entered, under the laws thereof.

It appears that since the filing of said application, township 31 north, range 20 west, has been surveyed, and that said survey has been approved. It is therefore only necessary to consider said application with reference to the land claimed in township 31 north, range 19 west.

The petitioners claim that they are the owners of the land which they ask to have surveyed, by reason of the applications of their grantors to select said lands under the provisions of the act of June 4, 1897 (30 Stat., 11, 36), in lieu of tracts within forest reservations relinquished to the government, to wit: Olga Sutro made application to select, with other lands, the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 18, in said last-mentioned township, which, it is alleged, was filed in the local land office September 8, 1900; John T. Murphy made application to select, with other lands, the SW. $\frac{1}{4}$, the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 7, the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ SW. $\frac{1}{4}$ of Sec. 18, in said township, which, it is alleged, was filed on or about the 16th of September, 1900; C. W. Clark made application to select, with other lands, the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of Sec. 18 in said township, which, it is alleged, was filed September 27, 1900. The petitioners allege that by mesne conveyances they afterwards became the owners of all of said lands, and that under section 2401 of the Revised Statutes, as amended by the act of August 20, 1894, they are entitled to have said sections surveyed by making a deposit sufficient to cover the cost of surveying such portions of the township as have been selected by them. You rejected the application, for the reason that there is no authority under section 2401 for the survey of fragmentary portions of a township.

The public lands are surveyed by townships, which are subdivided into sections containing, as nearly as may be, six hundred and forty acres each. (Section 2395, Revised Statutes.) Such is the general system of the public land surveys, and all laws providing for the survey thereof contemplate the survey of townships, except where segregation surveys are authorized to be made of lands that are not disposed of according to the legal subdivisions of public lands under the established system of surveys. Section 2401, Revised Statutes, authorizing the survey of public lands under what is known as the deposit system, is no exception to the rule, and was not intended to allow a departure from the established rule.

Section 2401, Revised Statutes, as originally enacted, authorized deposits for surveys to be made only by the settlers in any township who desired a survey made of the same. It provided that where a

sum sufficient to pay for such survey, together with all expenses incident thereto, shall be deposited in a proper United States depository, to the credit of the United States, it might be lawful for the surveyor-general to survey such township, provided the township so proposed to be surveyed is within the range of the regular progress of the public surveys. The settlers were required to deposit an amount sufficient for the survey of the entire township, although the expense of securing the survey might have to be borne by two settlers only. The section as amended merely extended the privilege to persons and associations lawfully possessed of coal lands, and to the owners or grantees of public lands of the United States, but it did not make any exception in favor of either class, or in any wise modify the provisions of the law as to the character or extent of the survey authorized by the section as originally enacted.

The purpose of the amendatory act was to enable the owners or grantees of public lands to advance the public surveys by deposits of money, to be placed to the credit of the proper appropriation, for the surveying service, in order to secure an adjustment of their grants. It did not confer any other privilege upon such owners than was conferred upon the settlers, who are required by the act to deposit a sum sufficient to pay for the survey of the entire township, together with all expenses incident thereto.

The language of the section is, "When the settlers in any township or when the owners or grantees of public lands of the United States desire a survey made of the same" (that is, of the *township*), "it shall be lawful for the surveyor-general to survey such township or such public lands." While the particular clause last quoted, if considered alone, might indicate a purpose to authorize the survey of fragmentary portions of a township at the instance of the owners or grantees of public lands, it must be considered in the light of the whole statute, and the intent gathered from all the provisions and expressions in the act. That it was not the intention to authorize any survey under said section that is not in accordance with the established system and policy of the government in surveying the public lands, is evident from the language of the provision: "That no application shall be granted unless the township so proposed to be surveyed is within the range of the regular progress of the public surveys embraced by existing standard lines or bases for the township and subdivisional surveys."

It would be impracticable, if not impossible, to make surveys of fragmentary portions of a township without departing from the established rules governing the survey of the public lands or without incurring an expense to the government that was not contemplated by the act. In making such surveys there would always be a liability to error that might thereafter be very difficult to correct.

The tracts applied for are adjacent to the east boundary of township 31 north, range 20 west, which has been surveyed and is the west boundary of the township in which the lands applied for are situated. While the section lines might be projected from said boundary so as to survey the subdivisions applied for, the laws governing the survey of the public lands require that section lines must be run from south to north and from east to west, so as to throw the excess or deficiency on the north and west sides of the township. If this application should be granted, and it should be found upon the survey of the township that there was an excess or deficiency from east to west, it would require an irregular closing of the township survey.

It illustrates the difficulties, the uncertainties, and liability to error in which the township surveys would become involved by departing from the established rules.

This disposition of the case renders it unnecessary to pass upon the question whether these applicants are or are not the owners or grantees of public lands of the United States.

Your decision is affirmed.

FOREST RESERVE—SETTLEMENT.

WILLIAM BREEDING.

The excepting clause of the proclamation establishing the Sierra forest reservation ceases to be operative in behalf of a settler who fails to make entry or otherwise place of record his claim for the lands settled upon within the time allowed by law.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) *August 26, 1901.* (E. B., Jr.)

This is an appeal by William Breeding from the decision of your office, dated April 10, 1901, affirming that of the local office at Visalia, California, rejecting his application, presented December 15, 1900, to make homestead entry for the NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 33, and the N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 32, T. 20 S., R. 31 E., M. D. M., situated within the limits of the Sierra forest reservation established by proclamation of the President, dated February 14, 1893 (27 Stat., 1059).

Breeding alleges that on or about November 12, 1890, he purchased from one Zack F. Pierpont the possessory claim to the land and the improvements then on the same for the sum of \$200; that Pierpont then and there delivered possession to him (Breeding); and that he has ever since resided upon and cultivated the land, and has placed valuable improvements thereon, with the intention of applying to enter it as a homestead as soon as it should be surveyed. The plat of the public survey of the land was filed in the local office April 24, 1900. July

14, 1900, said Pierpont made homestead entry No. 10316 for the land, but such entry was canceled upon the filing of Pierpont's relinquishment, December 15, 1900, and on the same day Breeding presented his application, which the local office rejected because the land was within the limits of a forest reservation and the application therefor was not presented within three months from the filing in that office of the official plat of survey of the land. An appeal by Breeding resulted in the affirmance by your office, as already stated, of the decision of the local office; and his further appeal has brought the case to the Department.

Appellant contends that the provision of the homestead law (Section 3, act May 14, 1880, 21 Stat., 140) requiring a settler upon unsurveyed public land to file his application and make entry therefor within three months from the filing in the local office of the plat of survey of the land, "was intended only to protect a subsequent applicant for the same land, and was not intended to be applicable where the question was solely between the homestead applicant and the government."

The proclamation establishing the said reservation excepts from the force and effect thereof:

all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired; and all mining claims duly located and held according to the laws of the United States and the rules and regulations not in conflict therewith;

Provided that this exception shall not continue to apply to any particular tract of land unless the entryman, settler or claimant continues to comply with the law under which the entry, filing, settlement or location was made.

In the case of *Arnold Wink*, decided here July 29, 1901 (31 L. D., 47), the unsurveyed land settled upon was afterward embraced within the limits of a public forest reservation, and the settler failed on account of sickness, as he alleged, to place his claim of record within the three months allowed after the filing of the plat of the public survey of the land. Considering, in that case, the above mentioned provision of the homestead law together with the proviso to the exception in the President's proclamation establishing the forest reservation, the language of the exception and proviso being identical with that set out above from the proclamation in this case, the Department said:

For various reasons it has frequently occurred that the time prescribed would be allowed to pass without making of application or entry. In the absence of a valid adverse claim it has been the practice to allow the settler to make entry after the expiration of the statutory period. But such adverse claim would defeat the settlement right where the latter was not protected by entry or filing. It is believed that under the express terms of the proviso to the exception of the President's proclamation the neglect or failure of a settler on land within the limits of the forest reservation, to make entry or filing within the time allowed by law, operates likewise to defeat his settlement right to such land.

The Department sees no reason to doubt the soundness of the rule thus laid down in the Wink case, and therefore adheres to the same in the case at bar.

It is further alleged, however, in an affidavit by said Breeding, corroborated by Robert B. Breeding:

That on the 23rd day of July, 1900, as soon as affiant heard that said land had been surveyed and was open to entry he came to the land office at Visalia for the purpose of filing thereon, and then learned that the said Pierpont had filed homestead application No. 10316 for the same land, and affiant was then and there informed by the Register and Receiver of the said land office that it would be impossible and useless to present any homestead application therefor because the land was already embraced in the entry of Pierpont, but that the proper course for him to pursue, upon the facts as stated by him, would be to protest the final proof of the said Pierpont.

In a report of the register of the local office, dated July 16, 1901, relative to this allegation, that official says:

Attention is called to the fourth paragraph on second page of said appeal, wherein it is stated by Breeding's attorneys that he came to this office as soon as he heard that said land was open to entry, and that the Register and Receiver informed him that the proper course for him to pursue "would be to protest the final proof of said Pierpont." At that time it was not known when final proof would be made by Pierpont, the entryman of record, and I can say for myself that I gave said Breeding no such advice. The Receiver of this office states that he does not remember of having had any conversation with said party in regard to his said application.

It is stated by counsel that "the applicant did not only present his application within three months, but did present it 'as soon as he heard that the township was surveyed,' so no laches can be imputed to him and he was strictly within the rights conferred upon him by the statutes."

This statement so far as the presentation of an application is concerned is not supported by the record. Breeding did not, so far as appears, present any application for the land until December 15, 1900, nor did he in any way prior to that time place his claim of record in the local office. Had he, however, presented an application for the land on July 23, 1900, or at any time thereafter prior to the filing of Pierpont's relinquishment, it could not have been received and would have been properly rejected because of the appropriation of the land by Pierpont's entry. The local officers deny advising Breeding, as he alleges they did on July 23, 1900, that his proper course was "to protest the final proof of Pierpont." His proper course, and the only course open to him then for the protection of his settlement claim, would have been to institute contest proceedings against Pierpont's entry before the expiration of the three months' period allowed by law for filing application to enter, or, in other words, for placing his claim of record in the local office. He had already permitted nearly the entire period within which he could act effectively to expire. He was not without proper remedy in the presence of Pierpont's entry while any

time of that period remained, but he failed to employ the remedy, and the land department cannot save him from the consequences. It is believed that under section 3 of the act of May 14, 1880, nothing short of placing his claim duly of record in the proper local land office will protect the claim of a homestead settler against an intervening valid adverse claim, or what in this case amounts to the same thing, against the operation of the proviso to the exception in the President's proclamation as hereinbefore set out.

The decision of your office is affirmed in accordance with the views herein expressed.

OKLAHOMA LANDS—HOMESTEAD—CONTEST.

CALVERT *v.* WOOD.

The selection and entry of land adjacent to a townsite, by a duly qualified and registered homestead applicant, is not in violation of the letter or spirit of the law under which the lands in the territory ceded by the Comanche, Kiowa and Apache Indians were opened to settlement and entry.

The unauthorized and illegal occupancy of public lands subject to homestead entry only constitutes no bar to such entry thereof by one who asserts a right by virtue of compliance with the law and regulations relating to the entry of such lands.

In making homestead entry of lands in the territory ceded by the Comanche, Kiowa and Apache Indians, it is not necessary that the lands shall be taken in square form; but the general provision of the act of March 3, 1891, amending section 2289 of the Revised Statutes, which directs that land to be taken as a homestead shall "be located in a body in conformity to the legal subdivisions of the public lands," will control as to the form of entries of these lands.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) August 30, 1901. (W. C. P.)

The Department is in receipt of your letter of August 27, 1901, enclosing the contest affidavit of J. L. Calvert against James R. Wood's homestead entry made August 6, 1901, for the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 31, T. 2 N., R. 11 W., Lawton, Oklahoma, land district.

This affidavit filed August 8th, and corroborated by C. H. Drake, contains the following allegations:

That the said James R. Wood made said H. E. in violation of the letter and spirit of the homestead law, by selecting and entering said land adjacent to the entire south line of the town of Lawton and only two blocks from the ground upon which the U. S. Land Office and the Court House is located. That said entry embraced land a mile long and only $\frac{1}{4}$ wide, thereby rendering the same more valuable for townsite purposes and less valuable for agricultural purposes. That said entryman made said entry in the manner above described at a time when said land was already settled and occupied by thousands of people engaged in actual business and trade. That said entryman could have selected his land in square form had the same been

desired for agricultural purposes. That said land embraced by said H. E. has continued to be occupied for trade and business purposes by thousands of people and a great number of houses and tents are at this time being erected on said land for business and speculative purposes with the full knowledge of said entryman. That said entry was not made in compliance with law, but for speculative purposes as above shown.

The land involved here is a part of the territory ceded by the Comanche, Kiowa, and Apache Indians by agreement ratified by act of Congress of June 6, 1900 (31 Stat., 672, 676), which, after directing that allotments shall be made to the Indians as in said agreement provided, contains provisions as to the disposal of said lands which, so far as they affect this case, are as follows:

That the lands acquired by this agreement shall be opened to settlement by the proclamation of the President within six months after allotments are made and be disposed of under the general provisions of the homestead and town-site laws of the United States.

Before the lands had been opened to settlement under that law Congress by the act of March 3, 1901 (31 Stat., 1093), gave further directions as to these lands and the manner in which they should be opened to settlement and entry. It was thereby directed that before such opening the Secretary of the Interior should subdivide the same into such number of counties as would for the time being best subserve the public interests, should designate the place for the county seat of each county and "set aside and reserve at such county seat, for disposition as herein provided, three hundred and twenty acres of land." The lands so set apart were, in advance of the opening, to be surveyed, subdivided and platted into lots, blocks, streets and alleys, and the lots were to be sold at public auction to the highest bidder at sales to be had at the opening and subsequent thereto.

Said act further provided as follows:

The lands to be opened to settlement and entry under the acts of Congress ratifying said agreements, respectively, shall be so opened by proclamation of the President, and to avoid the contests and conflicting claims which have heretofore resulted from opening similar public lands to settlement and entry, the President's proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled thereto under the acts ratifying said agreements, respectively; and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation until after the expiration of sixty days from the time when the same are opened to settlement and entry.

The President issued his proclamation July 4, 1901, declaring that the ceded lands, with certain exceptions specifically mentioned, "will on the 6th day of August, 1901, at 9 o'clock a. m., in the manner herein prescribed and not otherwise, be opened to entry and settlement and to disposition under the general provisions of the homestead and townsite laws of the United States."

The proclamation provided that persons desiring to make homestead

entry might be registered in the manner therein set forth and that during the first sixty days after the opening therein provided for no one but registered applicants would be permitted to make homestead settlement upon any of said lands. It then prescribed the manner in which during the first sixty days following the opening registered applicants would be permitted to make homestead entry of said lands.

There is provision in the proclamation for townsite settlement and entry as follows:

Any person or persons desiring to found, or to suggest establishing, a town site upon any of said ceded lands at any point not in the near vicinity of either of the county seats therein heretofore selected and designated as aforesaid, may, at any time before the opening herein provided for, file in the proper local land office a written application to that effect, describing by legal subdivisions the lands intended to be affected, and stating fully and under oath the necessity or propriety of founding or establishing a town at that place. The local officers will forthwith transmit said petition to the Commissioner of the General Land Office with their recommendation in the premises. Such Commissioner, if he believes the public interests will be subserved thereby, will, if the Secretary of the Interior approve thereof, issue an order withdrawing the lands described in such petition, or any portion thereof, from homestead entry and settlement and directing that the same be held for the time being for town-site settlement, entry, and disposition only. In such event, the lands so withheld from homestead entry and settlement will, at the time of said opening and not before, become subject to settlement, entry and disposition under the general town-site laws except in the manner herein prescribed until after the expiration of sixty days from the time of said opening.

It contains a declaration and warning, as follows:

All persons are especially admonished that under the said act of Congress approved March 3, 1901, it is provided that no person shall be permitted to settle upon, occupy, or enter any of said ceded lands except in the manner prescribed in this proclamation until after the expiration of sixty days from the time when the same are opened to settlement and entry. After the expiration of the said period of sixty days, but not before, any of said lands remaining undisposed of may be settled upon, occupied, and entered under the general provisions of the homestead and town-site laws of the United States in like manner as if the manner of effecting such settlement, occupancy, and entry had not been prescribed herein in obedience to law.

Only those who were permitted by the terms of the proclamation to go upon these lands have any right to be there during the period of sixty days after the date fixed for the opening. The rights of those who have gone there in conformity with the terms of the proclamation should and will be recognized and protected and they should not and will not be made to suffer because of the illegal and wrongful acts of those who have gone there in violation of those terms. The law limits the amount of land to be set apart for a county seat to three hundred and twenty acres and this quantity was thus set apart at Lawton. All land lying adjacent to the tract thus set apart and not otherwise appropriated was on the sixth day of August subject to homestead entry by qualified persons duly registered and entitled to make entry on that day of lands in the Lawton land district. There is no allegation that

Wood was not thus qualified, registered and entitled. The selection and entry of land adjacent to the town of Lawton was not in violation of the letter or spirit of the law, and the first allegation of Calvert's affidavit does not present a good ground of contest.

The land embraced in Wood's entry was not subject to appropriation for town-site purposes and hence the allegation that it was for any reason more valuable for such purposes than for agricultural purposes is not pertinent and can not be accepted as a reason for the cancellation of the entry under consideration.

The other allegations that at the time the entry was made the land was occupied for business and trade, that he could have selected it in square form had he desired it for agricultural purposes, and that it is still occupied for trade and business, a great number of houses being erected thereon with the full knowledge of the entryman, are not such as to warrant the ordering of a hearing. It is not alleged that this occupancy was by the procurement or even with the consent of the entryman. As pointed out hereinbefore, the land in question was not at the time of Wood's entry subject to appropriation for townsite purposes, nor was any person authorized to enter upon and occupy it for the purposes of trade and business. Any person who went upon and occupied it for such purposes was there without any color of right and in direct violation of the proclamation prescribing the manner of opening said lands and in open defiance of the President's warning. It will hardly be seriously asserted that persons in such a position have any rights in the premises. A contention that such unauthorized and illegal occupation of these lands constitutes a bar to homestead entry thereof by one who asserts a right by virtue of compliance with the law and regulations can not be sustained. To allow these lands to be appropriated for the purposes of a townsite would be to defeat the purpose of the selection of tracts for county seat purposes. The lots in these tracts designated as sites for county seats were to be sold for cash, the proceeds to be used to defray the expenses of the respective county governments until such time as funds from taxation should become available, and for the erection of public buildings and other public purposes. To allow adjacent lands to be occupied for townsite purposes would be to lessen the benefits to be obtained by the public from the sale of lots in the county seat town and thwart in a degree, if not in whole, the beneficent purposes of the legislation providing for those towns.

The last allegation of the contest affidavit is that this entry was made for speculative purposes "as above shown." As pointed out, none of the allegations referred to in the phrase "as above shown" constitutes a good ground of contest. Neither do these allegations taken together present such a ground. Under some circumstances the fact that one selects for a homestead entry land adjacent to an established town and occupied by others might afford substantial reason for the conclusion

that the selection was thus made for speculative purposes. But under the circumstances of this case, where Congress has provided for the disposition of the lands by way of homestead entry and not otherwise, and where the persons occupying the land are there in direct violation of law and regulations, no such effect should be given that fact.

It is not directly charged that this entry is illegal because of its form, but that charge may be implied from the allegations, and it is thought proper to refer to that point. The act of May 2, 1890 (26 Stat., 81), relating to the disposal of lands in Oklahoma, contains a provision as follows (p. 91):

All persons who shall settle on land in said Territory under the provisions of the homestead laws of the United States and of this act shall be required to select the same in square form as nearly as may be.

Section 5 of the act of March 3, 1891 (26 Stat., 1095), amends section 2289 Revised Statutes, so that as amended that section directs that lands to be taken as a homestead shall "be located in a body in conformity to the legal subdivisions of the public lands." This is the general provision of the homestead law as to the form of an entry. The act of June 6, 1900, *supra*, provides that these lands shall "be disposed of under the general provisions of the homestead and town-site laws of the United States." The general provision of the act of 1891 rather than the special provision of that of 1890 will control as to the form of entries of these lands. The lands embraced in the entry under consideration are "in a body in conformity to the legal subdivisions of the public lands," and it is not subject to successful attack because of the form of the land included therein.

For the reasons herein given it is deemed that the allegations of the contest affidavit are insufficient to demand the cancellation of Wood's entry, and the recommendation of your office that said affidavit be rejected is approved, and it is so ordered.

ALASKAN LANDS—MINING CLAIM—TOWNSITE.

HARKRADER ET AL. v. GOLDSTEIN.

The jurisdiction of the land department over public lands does not cease until the legal title has passed from the government.

A change in the person holding the office of Secretary of the Interior does not defeat or prevent a review or reversal in any instance where the Secretary making the ruling, or rendering the decision, if still holding the office, would be in duty bound to review or reverse his own act.

Where a person has complied with all the terms and conditions necessary to obtaining title, and the officers of the government whose duty it was to act in the premises in the first instance have accepted his proof and issued final certificate of entry thereon, he acquires a vested interest in the land embraced in his entry, and becomes *prima facie* the equitable owner thereof and entitled to a patent; and anyone thereafter attacking the entry assumes the burden of establishing such illegality in the procurement or allowance thereof as would defeat the issuance of patent thereon.

Conditions with respect to the character of land, as they exist at the date of entry, or at the time when all the necessary requirements have been complied with by the person seeking title, must determine whether the land is subject to sale or other disposition under the law upon which the application for patent is based, and no change in such conditions, subsequently occurring, can impair or in any manner affect the applicant's right to a patent, if in other respects established.

The right to a patent, once vested, is, for most purposes, equivalent to a patent issued, and when in fact issued the patent relates back to the time when the right to it became fixed.

In order to except mineral land from the operation of a townsite or other entry made in pursuance of law, the land must be known, at the time of the entry, to contain minerals of such character and value as to justify expenditures for the purpose of extracting them.

The acts of the heads of the several departments of the government, in relation to matters which appertain to their respective duties, are, in legal effect, the acts of the executive.

A question of executive reservation or appropriation of public lands, is one of fact, rather than of mere form.

Departmental decision of October 29, 1896, in the case of *Goldstein v. Juneau Townsite*, 23 L. D., 417, vacated and annulled.

Acting Secretary Ryan to the Commissioner of the General Land
(W. V. D.) *Office, September 3, 1901.* (A. B. P.)

By act of May 17, 1884 (23 Stat., 24), the Congress provided a civil government for the district of Alaska. By section 8 of the act the district of Alaska was created a land district, and a United States land office was established therein and located at Sitka. It was also provided in said section that—

the laws of the United States relating to mining claims, and the rights incident thereto, shall, from and after the passage of this act, be in full force and effect in said district *Provided*, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress: *And provided further*, That parties who have located mines or mineral privileges therein under the laws of the United States applicable to the public domain, or who have occupied and improved or exercised acts of ownership over such claims shall not be disturbed therein but shall be allowed to perfect their title to such claims by payment as aforesaid.

* * * * *

But nothing contained in this act shall be construed to put in force in said district the general land laws of the United States.

By the act of March 3, 1891 (26 Stat., 1095, 1099, section 11), it was provided as follows:

That until otherwise ordered by Congress lands in Alaska may be entered for town-site purposes, for the several use and benefit of the occupants of such town-sites, by such trustee or trustees as may be named by the Secretary of the Interior for that purpose, such entries to be made under the provisions of section twenty-three hundred and eighty-seven of the Revised Statutes as near as may be; and when such entries shall have been made the Secretary of the Interior shall provide by regulation for the proper execution of the trust in favor of the inhabitants of the

town-site, including the survey of the land into lots, according to the spirit and intent of said section twenty-three hundred and eighty-seven of the Revised Statutes, whereby the same results would be reached as though the entry had been made by a county judge and the disposal of the lots in such town-site and the proceeds of the sale thereof had been prescribed by the legislative authority of a State or Territory: *Provided*, That no more than six hundred and forty acres shall be embraced in one townsite entry.

October 13, 1893, John Olds, trustee, acting under the last-mentioned act, made townsite entry No. 1, Sitka, Alaska, embracing 121.52 acres of land and known as the townsite of Juneau. May 19, 1894, Anna Goldstein filed a protest against the issuance of patent upon the entry. She alleged ownership of a mining claim known as the Bonanza lode claim, located June 26, 1886, and in conflict with said entry; that the land embraced in said Bonanza claim was mineral in character and not subject to disposal under the townsite laws. A hearing was had upon the protest. The local officers found that the land in controversy was not mineral in character, and that finding was affirmed by your office. On appeal to the Department, the action of your office was, by decision of October 29, 1896, reversed, and it was directed that the townsite entry be canceled to the extent of its conflict with the Bonanza claim. (See *Goldstein v. Juneau Townsite*, 23 L. D., 417). The townsite survey and entry were subsequently amended to conform to said departmental decision, and patent has been issued accordingly.

February 6, 1899, Anna Goldstein filed application for patent to the Bonanza lode claim, survey No. 316, Sitka, Alaska. During the period of the publication of notice of this application protests were filed by George Harkrader and numerous other persons, based upon the use, occupation, and improvement by them of the land embraced in said mining claim. These protestants allege in substance that they are entitled to protection under the first proviso to section 8 of the act of May 17, 1884, *supra*; that the land covered by the Bonanza claim is not mineral land subject to entry under the mining laws; that a portion of the land covered by said claim was embraced in a government reservation at the time the claim was located, and has never been released from such reservation; that the mining claim is based upon fraud; and that the application for patent thereto should be rejected.

It appears that suits were instituted in the local court by some of these protestants (*Young et al. v. Goldstein*, 97 Fed. Rep., 303), and for that reason the local officers and your office in turn suspended action upon the application for patent. February 3, 1900, the Department held that the matters presented by the protest were not primarily for judicial investigation and could not be made the subject of adverse proceedings under sections 2325 and 2326 of the Revised Statutes. The suspension was thereupon vacated, and your office was directed to proceed to a full ascertainment of the facts and to a decision upon the rights of the government and other parties interested in the premises.

Acting under this direction, your office, by decision of July 10, 1900, held, in substance: (1) That the land in controversy had been determined to be mineral in character by the departmental decision of October 29, 1896, in the case of *Goldstein v. Juneau Townsite*, *supra*, and that such a determination is binding in this proceeding; (2) that a portion of the land applied for was embraced in a government reservation prior to and at the time of the location of the Bonanza claim, and should, for that reason, be excluded from said claim; and (3) that an amended survey should be made, to properly describe such exclusion, and to reform the lines of the claim in other particulars not material to be here mentioned. Subject to these modifications and requirements, the application for mineral patent was sustained and the protests dismissed.

Appeals from said decision have been filed by both the protestants and the mineral applicant. -

The protestants attack this decision of your office to the extent that the application for mineral patent is thereby sustained and their protests dismissed. Among other things, they allege that the issues raised by their protests involve the character of the land for which mineral patent is sought; that said land does not contain valuable mineral deposits and is not subject to disposal under the mining laws; that the departmental decision in the case of *Goldstein v. Juneau Townsite*, *supra*, is not an adjudication, determinate and conclusive against them, upon the question of the character of the land, or upon any other matter presented by their protests; that grave errors were committed in said departmental decision (1) in placing the burden of proof upon the applicant for townsite patent, (2) in holding the land covered by the alleged Bonanza location to be mineral in character, (3) in considering evidence relating to conditions which were not known to exist until after the date of the townsite entry, and (4) in not determining the character of the land upon the conditions as they existed and were known at the date of the entry. They ask that the decision appealed from be reversed; that the departmental decision of October 29, 1896, in the case of *Goldstein v. Juneau Townsite*, be recalled and vacated; that the townsite entry of October 13, 1893, to the extent canceled by said departmental decision, be reinstated; and that supplemental patent be issued to the townsite trustee to embrace the land excluded from the entry by such cancellation.

The errors assigned in the appeal by *Goldstein*, the mineral applicant, deny the correctness of your office decision with respect to the government reservation thereby held to have excluded from the mineral location a portion of the land included in the Bonanza claim, and also with respect to the amended survey thereby required. It is contended that the land in controversy having been found to be mineral in character by the departmental decision in the case of *Goldstein*

v. Juneau Townsite, that finding is final and conclusive; that no part of the land included in said claim was ever embraced in any reservation established by the government; that there is no necessity for an amended survey of the claim applied for; and that mineral entry should be allowed and patent issued upon the existing survey and application.

In view of the matters presented by the record, and by the appeals and arguments filed in support thereof, the Department, being convinced that its decision of October 29, 1896, in the case of *Goldstein v. Juneau Townsite*, should be reviewed and reconsidered, notice was given to all parties interested that an oral hearing would be had, at which they could present any claim or contention they might desire upon the questions involved in said decision. In response to the notice the parties all appeared by counsel and were heard both in oral argument and upon printed briefs.

That the subject-matter of the departmental decision of October 29, 1896, is still within the jurisdiction and control of the land department, there can be no doubt. The legal title to this land is still in the government.

It was held by the supreme court, in the case of *Michigan Land and Lumber Co. v. Rust* (168 U. S., 589, 592-3), as follows:

Generally speaking, while the legal title remains in the United States, the grant is in process of administration and the land is subject to the jurisdiction of the land department of the government. It is true a patent is not always necessary for the transfer of the legal title. Sometimes an act of Congress will pass the fee. *Strother v. Lucas*, 12 Pet., 410, 454; *Grignon's Lessee v. Astor*, 2 How., 319; *Chouteau v. Eckhart*, 2 How., 344, 372; *Glasgow v. Hortiz*, 1 Black, 595; *Langdeau v. Hanes*, 21 Wall., 521; *Ryan v. Carter*, 93 U. S., 78. Sometimes a certification of a list of lands to the grantee is declared to be operative to transfer such title, *Rev. Stat.*, 2449; *Frasher v. O'Connor*, 115 U. S., 102; but wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the government until the issue of the patent, *Bagnell v. Broderick*, 13 Pet., 436, 450; and while so remaining the grant is in process of administration, and the jurisdiction of the land department is not lost In other words, the power of the department to inquire into the extent and validity of the rights claimed against the government does not cease until the legal title has passed.

In *Beley v. Naphthaly* (169 U. S., 353, 364) the court said:

The fact that a decision refusing the patent was made by one Secretary of the Interior, and, upon a rehearing, a decision granting the patent was made by another Secretary of the Interior, is not material in a case like this. It is not a personal but an official hearing and decision, and it is made by the Secretary of the Interior as such Secretary, and not by an individual who happens at the time to fill that office, and the application for a rehearing may be made to the successor in office of the person who made the original decision, provided it could have been made to the latter had he remained in office.

See also, on the same subject, *Knight v. U. S. Land Association* (142 U. S., 161, 181); *Brown v. Hitchcock* (173 U. S., 473); *Hawley*

v. Diller (178 U. S., 476); *Parcher v. Gillen* (26 L. D., 34, 39-41); *Aspen Consolidated Mining Company v. Williams* (27 L. D., 1, 5, 11).

It appears that after the decision of October 29, 1896, in the case of *Goldstein v. Juneau Townsite*, *supra*, had been promulgated and notice thereof given to the parties, and before the thirty days allowed for filing a motion for review had elapsed, the attorney for the townsite trustee, apparently for the purpose of expediting the issue of patent for that portion of the land embraced in the townsite entry which was not affected by said decision, filed in your office a written waiver of "all rights of review, rehearing, or reconsideration." It is contended that the effect of this waiver was to preclude the townsite occupants of the land now in question from thereafter questioning said decision. The Department is not favorably impressed with this contention. It is not stated in said waiver, nor can it be reasonably inferred therefrom, that its purpose was to preclude the occupants of this portion of the townsite from thereafter applying to the Secretary of the Interior for the correction of any prejudicial errors or mistakes in said departmental decision. Moreover, it is doubtful whether it was within the authority of the townsite trustee to waive any rights of these occupants, in the absence of some assent by them, and the history of these proceedings shows that such assent was never given or intended. If serious errors were committed in the former departmental decision it is not only within the power of the Secretary of the Interior, but it is his duty, to see that they are corrected before patent is issued for the land. As was said by the supreme court in *Knight v. U. S. Land Association*, *supra*:

It makes no difference whether the appeal is in regular form according to the established rules of the Department, or whether the Secretary on his own motion, knowing that injustice is about to be done . . . takes up the case and disposes of it in accordance with law and justice. The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the government which is a party in interest in every case involving the survey and disposal of the public lands.

Believing that the interests of the government and of the contending parties require it, the Department has caused the record upon which its said decision of October 29, 1896, was based to be carefully re-examined. From such re-examination it appears that the townsite entry was made without protest or objection from anyone, upon proofs showing all the land embraced therein to be non-mineral in character, and after notice of the application for townsite patent had been regularly published and posted as required by law and official regulations. Goldstein's protest, wherein the land claimed under the Bonanza location was alleged to be mineral in character, was filed more than seven months after the townsite entry had been made. The principal

issue raised by that protest was the character of the land. The Department, in rendering its decision of October 29, 1896, placed the burden of proof upon the townsite entryman. The reason for so doing was stated as follows:

The townsite application and entry made pending the mineral location, and with a view to obtaining patent to the entire interest in all the land included in said mineral location, puts the townsite in the attitude of asserting the non-mineral character of all of said land, and of assuming the burden of establishing that fact by proof.

The rule thus stated and applied was clearly erroneous. True, the townsite entry was made after the Bonanza claim had been located, but the existence of such location was not in itself evidence of the mineral character of the land. (*Magruder v. Oregon and California R. R. Co.*, 28 L. D., 174; *Elda Mining and Milling Co.*, 29 L. D., 279.) The townsite entry was based upon proof showing the land to be non-mineral, against which proof no protest or objection was presented or raised at the time by the mineral claimant, although notice of the townsite application was regularly given and full opportunity afforded for presenting objections if there were any. After the allowance of the entry the townsite entryman was no longer in the attitude of one asserting the non-mineral character of the land. He had already submitted proof showing the land to be non-mineral. The local land officers had passed upon and approved his proof. They had accepted the money paid for the land and had given a receipt therefor, and upon the proof and payment had issued final certificate of entry. Having complied with all the terms and conditions necessary to obtaining title, and the officers of the government whose duty it was to act in the premises, in the first instance, having accepted his proof and issued final certificate of entry thereon, the townsite entryman, and those for whom he was trustee, had, upon the face of the record, acquired a vested interest in the land, and, under the law, had become *prima facie* the equitable owners thereof and entitled to a patent, and anyone thereafter attacking the entry thus allowed assumed the burden of establishing such illegality in the procurement or allowance of the entry as would defeat the issuance of patent thereon. (See authorities cited in *Aspen Consolidated Mining Co. v. Williams*, 27 L. D., 1.)

Manifestly, therefore, the onus of proving the alleged illegality of the townsite entry upon the protest in the former proceeding was upon Goldstein, the attacking party, and in holding otherwise the Department was clearly in error.

It is found that the Department was also in error upon another point in said decision. The hearing upon Goldstein's protest was had in April and May, 1895. The record shows that the evidence submitted at the hearing relates largely to examinations and prospecting of the land, after the date of the townsite entry, and to conditions as they existed immediately prior to the time of the hearing. This

evidence was all considered by the Department, and its said decision was in part based upon it.

It is well settled that the conditions with respect to the character of land, as they exist at the date of entry, or at the time when all the necessary requirements have been complied with by the person seeking title, must determine whether the land is subject to sale or other disposal under the law upon which the application for patent is based; that no change in such conditions, subsequently occurring, can impair or in any manner affect the applicant's right to a patent upon his entry, if in other respects established; that the right to a patent, once vested, is, for most purposes, equivalent to a patent issued, and when in fact issued the patent relates back to the time when the right to it became fixed.

In *Deffebach v. Hawke* (115 U. S., 392, 404) the supreme court, after referring to numerous provisions of the statutes relating to the disposal of lands valuable for minerals, said:

It is plain from this brief statement of the legislation of Congress, that no title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar, or copper can be obtained under the preemption or homestead laws or the townsite laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands except in the States of Michigan, Wisconsin, Minnesota, Missouri and Kansas. We say "land *known* at the time to be *valuable* for its minerals," as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term "mineral" in the sense of the statute is applicable. In the first section of the act of 1866 no designation is given of the character of mineral lands which are free and open to exploration. But in the act of 1872, which repealed that section and re-enacted one of broader import, it is "*valuable* mineral deposits" which are declared to be free and open to exploration and purchase. The same term is carried into the Revised Statutes. It is there enacted that "lands *valuable* for minerals" shall be reserved from sale, except as otherwise expressly directed, and that "*valuable* mineral deposits" in lands belonging to the United States shall be free and open to exploration and purchase. We also say lands *known* at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which, years afterwards, rich deposits of mineral may be discovered.

In *Colorado Coal and Iron Co. v. United States* (123 U. S., 307, 328) it was said:

A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins and mines, can not affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale.

See, also, *Kern Oil Co. et al. v. Clarke* (30 L. D., 550, 556-60); *Kern Oil Co. et al. v. Clotfelter* (30 L. D., 583); and authorities on this subject cited in those cases.

It is clear, therefore, that in its former decision the Department erred in considering and giving weight to evidence of the result of

examinations made of the land and of prospecting for minerals thereon, after the proofs in support of the application for townsite patent had been passed upon and approved by the local land officers, and payment for the land had been accepted and final certificate of entry issued. The rights of the parties should have been determined, and must now be determined, upon the conditions as they were known to exist at the date of the townsite entry—October 13, 1893.

It is also well settled that in order to except mineral land from the operation of a townsite or other entry made in pursuance of law, the land must be known, at the time of the entry, to contain minerals of such character and value as to justify expenditures for the purpose of extracting them. In other words, to exclude land from entry, except under the mining laws, it must be of known value for minerals and the known value must be such as to justify the expenditure of money and labor in extracting the minerals for mining purposes.

In *Dower v. Richards* (151 U. S., 658, 663) the supreme court, speaking on this subject, said:

It is established by former decisions of this court that, under the acts of Congress which govern this case, in order to except mines or mineral lands from the operation of a townsite patent, it is not sufficient that the lands do in fact contain minerals, or even valuable minerals, when the townsite patent takes effect; but they must at that time be known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them; and if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterwards discovered to be still valuable for such purposes, does not defeat or impair the title of persons claiming under the townsite patent. *Deffenback v. Hawke*, 115 U. S., 392; *Davis v. Webb*, 139 U. S., 507.

The testimony in the record has been carefully reexamined and considered in the light of the authorities here cited and of the principles therein enunciated. Such testimony utterly fails to show that the land embraced in the Bonanza claim was known to be valuable for minerals at the time the townsite entry was made. The utmost that can be reasonably said in favor of the contention of the mineral claimant in this respect, is that there were, at the date of the townsite entry, indications of the existence of mineral in the claim, but not in sufficient quantity to indicate or justify any systematic or continuous prospecting or working of the claim. Nor can it be said that at the time of the townsite entry the mining claim was of such recent location that there had not been opportunity to develop the extent and character of its claimed mineral deposits. At that time the mining claim had been located over seven years and there had been nothing more than a pretense of prospecting, working or developing the claim. The evidence falls far short of showing that the land was known, at the date of the townsite entry, to contain minerals of such extent and value as to constitute it land known to be valuable for minerals within the principle laid down in the case of *Dower v. Richards*, *supra*. It should be

observed, in this connection, that even upon a consideration of all the evidence, as well that relating to matters occurring after the entry as that relating to conditions existing at the date of the entry, and with the burden of proof placed upon the townsite trustee, the conclusion arrived at by the Department in its said decision of October 29, 1896, on the question of the character of the land, was of a doubtful and unsatisfactory, rather than of a positive and definite, nature. At the date of the hearing, there were improvements upon the land, made by others than the mineral claimant, of the value of \$50,000 or more.

It was stated in said departmental decision:

It can not be said that the testimony offered by the mineral claimant, taken as a whole shows a defined vein of mineral, in quantity and quality such as to make it a present paying mine, but it is strongly suggested that with further development it would be a paying mine. The testimony offered by the two sides, which was intended to show the present character of the land is pretty nearly balanced. . . .

It is apparent that if it should now be decided on the showing made, that the character of the land is non-mineral, the effect would be to withdraw and seal from mining enterprise what reasonably promises to be a valuable mine with further developments.

Upon careful and mature consideration of the entire record, the Department is of the opinion, and now decides, that the land in controversy was not known to be valuable for minerals at the date of the townsite entry, and was not for such reason excepted from said entry; that in its decision of October 29, 1896, the Department erred in holding the land to be mineral in character, and in canceling the townsite entry to the extent stated, for that reason. Justice demands, therefore, that said entry should be reinstated.

It was objected, by counsel for the mineral claimant, at the oral argument for the first time, that the townsite entry was irregularly allowed for the reason that certain proofs upon which it was in part based were not taken at the time and place stated in the notice of the application for patent, but at another time and place. It is not claimed, however, that the required proofs were not made, or that any one has been misled or in any manner injured by the alleged irregularity. Moreover, such irregularity, if in fact it occurred as alleged, was, in view of the position here taken, purely a question between the government and the townsite people.

From what has been said, it is apparent that none of the other matters presented by the parties litigant need be considered in so far as the claim of the applicant for mineral patent is concerned. It being now held that the land in controversy was not known mineral land at the date of the townsite entry, it necessarily follows that there is no foundation for the claim asserted by Goldstein, and that her application for mineral patent must be rejected.

It is proper, however, that the question of the government's right to the reservation held by your office to have been established prior to both the townsite entry and the Bonanza location, and to embrace a

portion of the land which would be included in the entry when reinstated, should be here determined. On this subject, in its decision of October 29, 1896, the Department said:

There appears to have been a government reservation for naval purposes, with three buildings erected upon it, made prior both to any occupancy for residence purposes and to the mineral location, which is included both in the mineral location and the townsite entry. So far as appears neither party can lay any just claim to this area, but further data would be necessary to adjust the rights of the parties so as not to interfere with this reserved area, which is not now proposed.

The records and files of the Navy Department disclose the following facts in relation to this reservation:

By letter dated Sitka, Alaska, May 7, 1881, Commander Henry Glass, of the navy, reported to the Secretary of the Navy that for the protection of the people and the preservation of good order at the mining settlement known as Rockwell (now the town of Juneau), Alaska, a military post should be established at that point, and for this purpose "a suitable location" had been "selected and marked as a government reservation." On the same day Lieutenant Commander C. H. Rockwell was ordered by Commander Glass to proceed to said mining settlement and to establish a post there. He was further directed to take "possession of the ground located for a government reservation," and to cause to be made "an accurate survey of the town plot in conformity with the original locations as shown by the mining recorder's books."

May 29, 1881, Lieutenant Commander Rockwell made report to Commander Glass of his arrival at Rockwell, and stated, among other things, that on May 13 Master G. C. Hanus proceeded to lay out the lines and to accurately stake the government reservation; that on May 21 the officers and marines of his command removed to quarters on the reservation; that Master G. C. Hanus, assisted by another officer, had completed a survey of the town, a plat of which would be forwarded as soon as finished, and a copy furnished to the district recorder.

From a copy of the Hanus plat, on file in the record, it appears that Block C and Block 7, represented as lying between 3rd and 4th streets and southwest of Main street in said town of Juneau, are marked "Reservation." It also appears, by a letter from said G. C. Hanus to the Secretary of the Navy, dated October 1, 1896, that this plat was adopted as official at a town meeting of the inhabitants of Juneau, held about the time the survey was completed.

Commander Glass, in his monthly report to the Secretary of the Navy, dated June 6, 1881, among other things, stated:

Since the establishment of the military post at the mining camp of Rockwell, as reported in my letter No. 13 of May 7th, affairs there have been perfectly quiet and no trouble is now anticipated.

In a letter dated Juneau, Alaska, September 29, 1884, addressed to the Secretary of the Navy, by H. E. Nichols, Lieutenant Commander, commanding the Pinta, it was stated:

I respectfully request instructions regarding the following property, which I have reason to believe belongs to the Navy Department, namely, three houses and a small land reservation at this place.

No record of any kind relating to this property was turned over to me when I assumed command of the Pinta, but referring to a letter signed by Commander Glass dated June 6, 1881, which I find in a Congressional document of date February 24th, 1882, which refers to a report of the construction and first occupancy of these buildings by Lieut. Rockwell, I believe they have been occupied every winter by a small force from the vessel of war stationed in these waters.

I find the buildings occupied as follows: The one used as "officers' quarters" by Mr. States, the U. S. Commissioner to Juneau, ; the "barracks" is used as a lockup or jail; the third one is used by Mr. States as a court room.

I have informed the Governor and Marshal that while I am willing to concede the occupancy of the buildings as at present, I hold them as still belonging to the navy, and if the necessities of the future require it they must be vacated for naval (military) purposes.

Replying to said letter, December 13, 1884, the Secretary of the Navy, among other things, said:

Referring to your letter September 29, concerning three houses and a small land reservation at Juneau, Alaska, which you have reason to believe belongs to the Navy Department, but which are now occupied by the civil authorities, to whom you have given notice that such occupation is subject to the right of this Department to take possession thereof when needed for naval (military) purposes, you are informed that your action is approved.

May 23, 1885, a written notice of the reservation, signed by Lieutenant Commander H. E. Nichols, was filed with and recorded by the District Recorder at Juneau. The notice was as follows:

Know all men by these presents that I, Lieut. Comdr. H. E. Nichols, U. S. N. Comd. U. S. S. Pinta and Senior Officer in Alaska, for the purpose of more fully describing and defining the boundaries of a certain piece or parcel of land designated and described and reserved by Comdr. Henry Glass, U. S. N. Senior Naval Officer, on May 2nd, 1881, as follows:

"The whole embracing lots 1, 2 & 3 in block 7 and land adjoining to low water mark is reserved for garrison purposes."

The said parcel of land originally reserved by said Comdr. Henry Glass being more fully described to wit:

All of Block 7 except lots 4, 5 & 6 and all of Block C in town of Juneau, Alaska, as it appears on the plat of survey made by Master G. C. Hanus U. S. N. and accepted by the miners and citizens of Rockwell, now Juneau City, Alaska.

The said above described parcel of land is reserved by the U. S. Navy for the U. S. Government for Garrison and Military purposes.

H. E. NICHOLS,

Lieut. Comdr. U. S. N. Comd. U. S. S. Pinta & Senior Nav. Off. in Alaska.

JUNEAU May 23, 1885.

October 10, 1885, a further notice, signed by the same officer, was filed and recorded in the office of said District Recorder. This second notice was as follows:

Know all men by these presents, that I, Lieut. Comdr. H. E. Nichols, U. S. Navy, Com'dg U. S. S. Pinta and Senior Naval Officer in Alaska, for the purpose of more fully describing the U. S. Military Reservation and buildings thereon, in the town of Juneau, designated, described in the town records, and reserved by Com'dr Henry Glass, U. S. N., Senior Naval Officer, on May 2, 1881, and more fully described by Lieut. Com'dr H. E. Nichols, U. S. N. Senior Naval Officer on May 23d, 1885, give notice, as follows, that the three buildings erected thereon are the property of the United States, through the Navy Department, that they were erected by the U. S. Navy in 1881, and thereafter occupied by the U. S. Naval Forces in Alaska, until 1884, when the Civil Government were permitted to use them temporarily for government purposes. A full description of these buildings was filed at the Navy Department in a report by Com'dr Glass, U. S. N., in June, 1881, and by Lieut. Com'dr Nichols, U. S. N., in a report to the Secretary of the Navy, dated Sept. 29th, 1884.

H. E. NICHOLS,

Lieut. Com'dr. U. S. N. Com'dg U. S. S. Pinta & Senr. Nav. Off. in Alaska.

JUNEAU, ALASKA, Oct. 10, 1885.

October 22, 1885, Lieutenant Commander H. E. Nichols recommended that the reservation and the three buildings thereon be turned over to the civil government, for the reason that the buildings were in need of repairs which he had no means of making. December 26, 1885, the Secretary of the Navy, replying to said recommendation, expressed the opinion that so long as the civil authorities continued in possession of the buildings upon the reservation no action was necessary either with the view to repairing the buildings or for the purpose of making a formal transfer of the reservation to the civil authorities, "who are at liberty to make such repairs . . . as they may deem proper."

In a letter dated September 10, 1896, addressed to the Secretary of the Navy by Commander (formerly Lieutenant Commander) H. E. Nichols, that officer, speaking of the Juneau townsite and of the survey and plat thereof made by G. C. Hanus in 1881, says:

On this townsite lots were rapidly located and buildings erected. A block of this plat was selected and reserved by Commander Glass for Naval purposes; this was before the advent of the civil government. On this block were erected three buildings, a small cottage for officers use, a barrack building for sailors and marines, and a small building for a guard house. These buildings were occupied every winter by a force of officers, sailors and marines from the "Jamestown," and afterwards the "Wachusett," for the purpose of preserving order in the camp.

* * * * *

The buildings noted were built by Lieutenant Rockwell, U. S. N., for the occupancy of the naval force by direction of Commander Glass, and the reservation made at the same time, and up to the time I left Alaska, there was no question of its ownership and it was known to the miners of that town as the naval reservation.

In a communication from the Secretary of the Navy to the Secretary of the Interior, dated April 25, 1897, it is stated:

While the action of Commander Glass in establishing the naval reservation at Juneau was doubtless tacitly approved by this Department at the time, it does not appear that any formal action in this direction was ever taken. This reservation seems to have been subsequently taken possession of and the buildings thereon occupied by the Territorial officers, and the reservation itself was, in a somewhat informal manner, turned over to the civil authorities.

By the foregoing recital it is clearly shown (1) that in May, 1881, a government reservation was established at Rockwell (now Juneau), Alaska, by Commander Henry Glass, an officer of the Navy, and was surveyed and the lines thereof laid out by Master G. C. Hanus, of the navy, in connection with a survey of the town made by said Hanus at the same time, all of which was, by said Commander Glass, reported to the Navy Department in the same year; (2) that written notice, wherein the location and boundaries of the reservation were described with substantial accuracy with reference to the plat of the Hanus survey, was given by Lieutenant Commander H. E. Nichols, also an officer of the navy, and filed and recorded in the office of the District Recorder at Juneau in 1885; (3) that the reservation was for a period of years used and occupied for government purposes by the officers, sailors, and marines of the navy, on duty at Juneau, and was recognized by the Secretary of the Navy in various communications relating to the same and by his approval of the acts of his subordinate officers in respect thereto; (4) that the reservation has been for some time occupied and used for public purposes by the civil authorities of the Territory of Alaska; and (5) that the land has never been released from reservation but is still used by the government for public purposes.

That the government possesses the power and authority, through the executive, to make a reservation of the public lands for any needful public purpose there can be no question. It is also well settled that the acts of the heads of the several departments, in relation to matters which appertain to their respective duties, are, in legal effect, the acts of the executive.

In *Wilcox v. Jackson* (13 Peters, 498, 513) the supreme court, speaking of a reservation made by the Secretary of War, said:

Now although the immediate agent in requiring this reservation was the Secretary of War, yet we feel justified in presuming that it was done by the approbation and direction of the President. The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. . . . Hence we consider the act of the War Department in requiring this reservation to be made, as being in legal contemplation the act of the President.

See also the cases of *Wolsey v. Chapman* (101 U. S., 755, 768-9); *United States v. Stone* (2 Wall., 525, 537); *Hegler v. Faulkner* (153 U. S., 109, 117).

It was said in the case of *J. M. Longneckér* (on review, 30 L. D., 611, 614), "A question of reservation and appropriation of public lands, there being power to make it, is one of fact, rather than of mere form;" citing *State of Minn.* (22 L. D., 388); and *Spalding v. Chandler* (160 U. S., 394-404).

While the establishment of the reservation at Juneau in 1881, by Commander Glass, was never formally approved by the Secretary of the Navy, it is clear that the several acts of that officer and the communications by him to his subordinate officers in respect to said reservation, as hereinbefore set out, were equivalent to and had the effect of a formal order of approval.

This Department is therefore of opinion that the land in Block C and Block 7, represented on the plat of the Hanus survey, and described in the written notice by Lieutenant Commander H. E. Nichols recorded May 23, 1885, was lawfully set apart and reserved by the government for public purposes, and has never been released from but is still subject to such reservation.

In view of all the foregoing, the decision of your office of July 10, 1900, in so far as inconsistent with the views herein expressed, is hereby reversed. In other respects said decision is affirmed. The departmental decision of October 29, 1896, in the case of *Goldstein v. Juneau Townsite* (23 L. D., 417), is hereby vacated and annulled, and the townsite entry of October 9, 1893, made by John Olds, trustee, to the extent that it was canceled by said departmental decision, is hereby reinstated with like effect as though such cancellation had never been made, except that the land within the government reservation herein referred to, as designated and described in the notice thereof recorded in 1885, shall be excluded from the entry. A supplemental patent will be issued to embrace the entry as thus reinstated.

HOMESTEAD-SOLDIERS' ADDITIONAL-ASSIGNMENT.

FRANK J. O'DONNELL.

Where a party sells his right to make soldiers' additional entry, and executes and delivers an absolute assignment therefor, he has no right, by reason of the default of the purchaser to pay the price agreed upon for such assignment, which he can enforce against an innocent purchaser who purchased the right upon the faith of such assignment.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office, September 5, 1901.* (E. F. B.)

This appeal is filed by Frank J. O'Donnell from the decision of your office of April 20, 1901, rejecting his application, as assignee and owner of the soldiers' additional homestead right of *Salemuel E. Ewing*, to

make entry of the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ Section 23, Township 56 north, Range 9 west, 4th P. M., Duluth, Minnesota.

The appellant filed in support of his application certain proofs showing that Ewing was entitled to the soldiers' right to additional entry, and that such right to additional entry had been sold and assigned to Theodore F. Barnes, April 17, 1899, from whom it was purchased for a valuable consideration by applicant, July 2, 1899. Also proofs showing that applicant is qualified to make entry of the land applied for.

Before acting upon said application your office, by letter of September 21, 1899, notified Ewing of the application of appellant and allowed him fifteen days in which to show cause why said application should not be allowed. To said notice Ewing showed that Barnes gave him a check for one hundred and sixty dollars, which was payable on condition of the additional right being allowed by your office, but that he had received nothing whatever from Barnes in payment of his right of entry.

In passing upon said application your office, by letter of September 20, 1900, found the application to be defective, in the following particulars:

The soldier fails to show whether or not he has made any other homestead entry than that on which this application is based.

The post office addresses of the identifying witnesses are not given.

The intermediate assignee has failed to furnish an affidavit showing purchase of said right in good faith, for a valuable consideration from the soldier, Salemuel E. Ewing, and ownership thereof at the date of his assignment.

The assignment of the intermediate assignee is in blank.

You then made the following order:

As the soldier has not been paid for his right, you will notify O'Donnell that he will be allowed thirty days in which to show cause, if any exists, why said application should not be rejected, and that in the event of his failure to take action within the time specified, his application will be rejected.

No action having been taken by applicant in response to said rule, your office by letter of April 20, 1901, rejected the application of O'Donnell, from which he has appealed.

The material question involved in this appeal is, whether the applicant is the true and lawful owner of said right to additional entry under valid assignments from Salemuel E. Ewing.

Among the proofs filed with the application is an affidavit, made by Ewing, who swears that he has executed additional homestead proof papers, and sold and assigned his right of additional homestead entry to Theodore F. Barnes, Lincoln, Nebraska, and that the affidavit is made to be filed in the General Land Office by the said Barnes as evidence of said sale. It is witnessed by D. H. Andrews and A. A. Thompson, and sworn to before a notary public. He also filed the following assignment:

Whereas, the undersigned, S. E. Ewing, is entitled to an additional entry of 89.14 acres of public land under and by virtue of the provisions of Section 2306 of the

Revised Statutes of the United States, as shown by the accompanying proof, being additional to my original homestead entry of 72.86 acres;

And Whereas, he has this day sold said right of entry to Theo. F. Barnes, and has received full payment therefor, the receipt whereof is hereby acknowledged;

Now, This Assignment Witnesseth, for value received, I, S. E. Ewing, do hereby sell, assign and transfer to the said Theo. F. Barnes and to his heirs and assigns forever my right to make entry of 80 acres of public land to which I am entitled under the provisions of Section 2306 as aforesaid, and authorize him, the said Theo. F. Barnes, his heirs and assigns, to make such entry of public land and receive a patent therefor, this assignment being made for the express purpose of divesting the undersigned of his right to make an additional entry of public land under the provisions of Section 2306 as aforesaid, and to vest such right of entry in the said Theo. F. Barnes, his heirs and assigns forever.

Signed, sealed and delivered this 17 day of April, 1899.

S. E. EWING (SEAL)

Witnesses:

D. H. ANDREWS

A. A. THOMPSON

State of Idaho }
County of Ada } ss.

On this 17 day of April, 1899, before me personally came S. E. Ewing, to me well known as the person who executed the foregoing assignment and the accompanying proof, and acknowledged the foregoing assignment to be his act and deed for the purposes therein named.

(SEAL)

HARRY C. WYMAN,
Notary Public.

Also an assignment by Barnes of such right for a valuable consideration, in which the name of the assignee does not appear, but it is shown by affidavits that such assignment was executed by Barnes and delivered to O'Donnell, who purchased said right from said Barnes through a bank in Duluth, Minnesota, for the sum of \$300; that neither applicant nor his attorney, who conducted the purchase, had a personal acquaintance with said Barnes or the said Ewing, and knew nothing of the agreement made between said parties, except such as has been given by your office, nor did they have any knowledge that any fraud had been committed by Barnes against Ewing when said right was purchased by applicant; that the agent of the said Barnes executed the assignment in blank, and authorized the attorney of applicant to insert the name of Frank J. O'Donnell therein, and the failure to insert said name in the assignment is wholly the fault of applicant's attorney.

The soldier's right to additional entry is a property right that may be sold and transferred by the soldier as any other property right. Ewing did not deal with Barnes as his agent to locate land for him under such right, but their relations were simply those of vendor and purchaser. There is not the slightest evidence that O'Donnell or his attorney had any knowledge whatever of any defect in the title of Barnes, or that the purchase and assignment of Ewing's right to additional entry was dependent upon any condition to be performed, or that such condition

had not been fulfilled. In selling his right to Barnes, Ewing gave him credit for the purchase money, and executed an absolute assignment of his right, which was delivered to the purchaser. He put into the hands of Barnes the evidence of such purchase, not only acknowledged before witnesses, but sworn to by himself, and thus put it in the power of Barnes to dispose of such right to an innocent purchaser for value, which he did. Ewing has no right by reason of Barnes's default that he can enforce against an innocent person who purchased upon the faith of his own act and deed so solemnly acknowledged. It is but the case of two innocent persons suffering from the fraud or misconduct of a third person to which the maxim justly applies that, where one of two innocent persons must suffer, he shall suffer who by his own acts occasioned the confidence and the loss.

In the case of George Dean, decided May 21, 1901 (not reported), it was said:

The regulations require that the assignee of a soldiers' additional homestead right shall furnish satisfactory "proof of ownership and of *bona fide* purchase for value." Dean, having proved the execution and acknowledgment of the assignment by Mrs. Henley, and her acknowledgment of the payment of the consideration, has complied with the requirement of the regulations in that regard, and it is not for this Department to go behind this admitted assignment to inquire whether the consideration was actually paid as therein stated, or whether the assignment was executed on the promise of the assignee to pay it, that being a matter entirely between Mrs. Henley and the assignee, with which the government has nothing to do.

Two other particulars in which you held that said application is defective, to wit, that the post office address of the identifying witnesses is not given, and that the assignment of the intermediate assignee is in blank, do not now appear to be sufficient to warrant the withholding of your approval of said application, in view of the fact that said witnesses have filed a sworn statement in the case, executed and mailed by them from Boise, Idaho, and it appearing from the affidavit of the attorney for applicant that the failure to insert the name of O'Donnell was wholly his fault and should have been inserted at the time of the purchase.

There was no error in requiring the applicant to show that Ewing had not made any other homestead entry than the one upon which the application is based. The regulations prescribing the manner of making an entry by the assignee of soldiers' additional right (General Circular, 1899, page 30) require the applicant to file, with other proofs, "the affidavit of the soldier showing that he has in no manner exercised his homestead right since making the original entry, either by making an additional entry under said section 2306 R. S. or under any other act."

The affidavit of Ewing, filed with the application, states that "he has not made any prior application for an additional homestead entry under the provisions of section 2306, Revised Statutes," but it does

not state that he has not made an additional entry under any other act. Such proof should be supplied.

From original letters and copies of correspondence filed with the appeal, it appears that the affidavit required has been executed by Ewing, and was sent by him to the bank at Lincoln, Nebraska, and was returned to him with Barnes's unpaid check for \$160. In a letter to applicant's attorneys, purporting to have been written by Ewing, through W. S. Walker, and dated March 8, 1901, he says: "The affidavit I still have as returned to me, and shall hold until I get my money, either in Boise bank or know that I have it in the Lincoln Bank." If the soldier refuses to furnish the affidavit, the proofs required by the regulations may be supplied from other sources, but you should require a reasonable showing by the applicant that the soldier is entitled to the additional right of entry before the entry can be allowed.

Your decision is modified accordingly.

HOMESTEAD—SOLDIERS' ADDITIONAL—CERTIFICATE.

JOHN H. HOWELL.

Where it appears that a party has been given a mere power to locate a soldier's certificate of right to make additional entry, uncoupled with any interest therein, it is unnecessary for the present holder of such certificate, upon applying to locate the same, to furnish the affidavit of such party showing whether or not he now has any interest in the certificate.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) September 9, 1901. (J. R. W.)

John H. Howell appealed from your office decision of June 28, 1901 requiring him to file the affidavit of Thomas Alsop, whether or not he had any interest in the certificate of right of additional entry issued January 24, 1880, in the name of Allen and Carrie Crawford, minor orphan children of Michael Crawford, for 85.63 acres, of which 5.63 acres remain unsatisfied.

The certificate of right having issued to one Kavanaugh, guardian of the minors, he afterward executed two powers of attorney to D. H. Talbot, both dated April 2, 1880, one giving him power—

To receive the certificate acknowledging my said right, and to locate for me, and in my name, place and stead, at any land office in the United States such lands as I may be entitled to enter as additional to my original homestead.

No further power than to locate the right was conferred by this instrument, except a power of substitution. To that power Talbot, June 1, 1881, substituted Thomas Alsop, of Laramie, Wyoming.

The other power authorized Talbot or his substitute to locate the

land, take possession, sell, and convey it, on any terms to them meet, and—

covenanting with my said attorney, his heirs or assigns, that I will, from time to time, and at all times hereafter, execute, acknowledge, and deliver, or cause to be executed, acknowledged, and delivered, such further and other conveyances, for the better assuring to my said attorney or his assigns the said described premises, as my said attorney or his assigns of the said described premises shall reasonably advise and require, giving, &c. . . . This power of attorney is made irrevocable, and I do hereby release unto my said attorney all my claims to any of the proceeds of any sale or lease of said premises; hereby ratifying and confirming whatever my said attorney, or his substitute may do in the premises.

To this power Talbot, June 1, 1881, in due form, substituted Walter Sinclair, of Laramie, Wyoming.

July 3, 1900, Walter Sinclair, by a bill of sale in the form of an affidavit, assigned the residue, 5.63 acres of the right, to John H. Howell, making oath that he is the owner and is the person who located the original certificate upon eighty acres, March 7, 1883, at Cheyenne, Wyoming, and who purchased it in good faith for full value from the original owner, and that he never used or sold the 5.63 acres residue of the certificate. The applicant Howell makes oath that he is owner.

The power is much more full and manifestly a sale than that in *Webster v. Luther* (164 U. S., 331, 333), in that the word "heirs" and the covenant for further assurances of title to the attorney, his heirs or assigns, appear in the power here in question. Under that decision it must be held that this power, to which Sinclair was substituted, evidences an absolute sale to him of the whole right.

The power to which Alsop was substituted was a naked power to locate, uncoupled with any interest, and indicates no right or interest in him. An affidavit from him is therefore unnecessary.

Your office decision is reversed.

INDIAN LANDS—COMMISSIONS—ACTS OF JANUARY 14, 1889, AND
JANUARY 26, 1901.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington D. C., September 6, 1901.

Registers and Receivers, United States Land Offices.

GENTLEMEN: Under date of August 17, 1901 [31 L. D., 72], the Department held that in case of moneys received on certain homestead entries made on agricultural Chippewa Indian land in the Crookston, Minn., land district, under the act of January 14, 1889 (25 Stats., 644), and thereafter commuted in pursuance of the provisions of the act of January 26, 1901 (31 Stats., 740), that:

The Register and Receiver at Crookston are not entitled to commissions on the moneys in question, either payable out of such moneys or out of the public moneys

of the United States, but that, upon the price of the land embraced in said entries as excess acreage and upon the price of the land involved in the commuted entries, said officers are, in the opinion of the Department, entitled to the commissions specified in the third paragraph of section 2238 of the Revised Statutes, the same to be paid by the entryman as therein provided.

This ruling applies to all homestead entries on ceded Indian reservations, affected by the act of May 17, 1900 (31 Stats., 179), and commuted, under the provisions of the act of January 26, 1901, above referred to.

You will, therefore, in all such cases require the entryman to pay, in addition to the Indian price per acre, two per cent on the price of the land as final commissions, and also a commission of two per cent on the amount received for excess acreage.

Very respectfully,

W. A. RICHARDS,
Acting Commissioner.

Approved, September 13, 1901:

THOS. RYAN, *Acting Secretary.*

WICHITA AND COMANCHE, KIOWA AND APACHE LANDS—DISPOSITION
AFTER EXPIRATION OF "SIXTY DAYS PERIOD."

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 16, 1901.

Registers and Receivers, El Reno and Lawton, Oklahoma.

SIRS: By act of Congress approved March 3, 1901 (31 Stat., 1093), it was provided that the ceded Wichita and Comanche, Kiowa and Apache lands—

shall be so opened by proclamation of the President, and to avoid the contests and conflicting claims which have heretofore resulted from opening similar public lands to settlement and entry, the President's proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled thereto under the acts ratifying said agreements, respectively; and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation until after the expiration of sixty days from the time when the same are opened to settlement and entry.

And by proclamation of the President dated July 4th last, after providing for the manner in which these lands might be settled upon, occupied and entered during the sixty days period, it was further provided that—

after the expiration of the said period of sixty days, but not before, any of said lands remaining undisposed of may be settled upon, occupied, and entered under the general provisions of the homestead and townsite laws of the United States in like manner as if the manner of effecting such settlement, occupancy, and entry had not been prescribed herein in obedience to law.

According to said proclamation this period of sixty days began on August 6, 1901, and as a consequence will expire at midnight of October 4, 1901. Thereafter all lands not having been entered under the plan provided for in said proclamation may, in accordance with the terms thereof, be settled upon, occupied, and entered under the general provisions of the homestead and townsite laws of the United States in like manner as if the manner of affecting such settlement, occupancy, and entry had not been prescribed in said proclamation in obedience to law.

While these lands will become subject to settlement immediately after midnight of the 4th, it will not be possible to make entry thereof until the opening of the respective land offices on the morning of the 5th of October next. It may and possibly will occur that at the time of the opening of the office on October 5th next a number of persons will have assembled at your office seeking to enter these remaining lands, and in order to avoid confusion it is directed that the applications of all qualified persons present at your office at nine o'clock a. m. on October 5th next, seeking to make entry of these lands, be received and treated as presented at nine o'clock a. m., and if there be more than one application for the same tract, they will be considered as simultaneously presented. Such of the persons present who may be acting as agents of honorably-discharged soldiers and sailors entitled to the benefits of section 2304 of the United States Revised Statutes, as amended by the act of March 1, 1901 (31 Stat., 847), will each be entitled to file but one soldiers' declaratory statement at that time. After the disposition of applications presented by persons present at nine a. m., which should be proceeded with at once, all other applications presented will be disposed of in the usual way, the time of actual presentation being duly noted on the application.

Very respectfully,

W. A. RICHARDS,
Acting Commissioner.

Approved, September 25, 1901:

THOS. RYAN, *Acting Secretary.*

MINERAL LAND—BRICK CLAY.

KING ET AL. v. BRADFORD.

Lands containing deposits of ordinary brick clay are not mineral lands within the meaning of the mining laws, though more valuable for such deposits than for agricultural purposes.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) October 10, 1901. (A. C. C.)

February 21, 1891, Fielding Bradford applied to make homestead entry for the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ Sec. 17, T. 3 N., R. 7 W., M. M.,

Helena, Montana, land district. The land being within the limits of the grant to the Northern Pacific Railroad Company, act of July 2, 1864 (13 Stat., 365), a controversy involving the same arose between Bradford and said company, the proceedings in which resulted in a decision of this Department, August 7, 1897 (unreported), wherein it was held that the land was excepted from the company's grant. Proceedings were subsequently had by other parties involving the land, which it is unnecessary to set forth in detail. It is sufficient to say that on July 14, 1899, Bradford was allowed to make homestead entry of said land.

July 31, 1899, Silas F. King *et al.* filed a protest against said entry, alleging that the land contains placer gold and a deposit of brick clay; that it is mineral in character; that the clay therein is valuable for the manufacture of brick; and that the land is more valuable for minerals than for agricultural purposes. A hearing was had at which all parties appeared. On the evidence submitted the local officers found that the land does not contain mineral, but that a deposit of clay exists therein from which ordinary brick can be manufactured, and, when manufactured, can be sold at a profit in Butte City, Montana, near which place the land is situated; further, that the land is more valuable for the manufacture of brick than for agricultural purposes.

July 1, 1900, on appeal, your office affirmed the finding of the local officers, in that said land is non-mineral in character, from which decision protestants have appealed to the Department.

From the evidence submitted at the hearing the following facts appear:

1. That the land in controversy is of very little value for agricultural purposes.
2. That no substance heretofore regarded as mineral by the Department exists therein.
3. That said land contains a deposit of ordinary clay from which an inferior quality of brick have been manufactured, which have been used in the erection of ordinary buildings and in the construction of a sewer in Butte City, Montana, in the immediate vicinity of said land.
4. That the brick so made have been sold at a profit in Butte City.
5. That said land is more valuable for the manufacture of such brick than for agricultural purposes.

It is a matter of common knowledge that the deposit which is found upon the land is a substance which exists generally, in quantities more or less varying, throughout the entire Rocky Mountain region, and that lands where such substances exist are usually capable of producing agricultural crops.

The facts in this case, however, bring it clearly within the rulings in Dunluce Placer Mine (6 L. D., 761), and Blake Placer, decided January 17, 1889 (unreported), which are to the effect that lands contain-

ing ordinary brick clay are not mineral lands within the meaning of the mining laws.

In the first of the above cases it was held that a deposit of *brick clay*, which rendered the land upon which it existed more valuable on that account than for agricultural purposes, was not subject to entry as mineral land; in the second it was decided that land chiefly valuable on account of deposits of *ordinary brick clay* could not be entered under the mining laws.

Notwithstanding the above rulings, it is contended by protestants that the clay found upon the land here in question is a mineral, and as the land is of more value for the manufacture of ordinary brick than for agricultural purposes it is mineral in character.

It is further insisted that the above cited cases were not well considered; that the conclusions arrived at therein are wrong in principle, not supported by authority, and that said cases have been practically overruled by later decisions of the Department.

In support of the above propositions counsel for protestants have filed an elaborate brief, which has been carefully examined and considered, but in the opinion of the Department no valid reason has been presented for disturbing the rulings heretofore made and referred to above.

While it is true, as stated by counsel, that in Dunluce Placer Mine, *supra*, no reason was given for the conclusion reached, yet it can not be assumed that the question involved and decided was not carefully considered. In Blake Placer Claim (unreported) the decision was upon a motion for review, and an examination of the papers in the case shows that the question involved and determined was thoroughly investigated before the decision was rendered.

The contention that the rulings above referred to are antagonistic to later decisions and that the Department has practically overruled the cases wherein they were made, is not supported by the citations in the brief of counsel, as an examination will disclose. The cases referred to are Pacific Coast Marble Co. v. Northern Pacific Railroad Co. (25 L. D., 233); Phifer v. Heaton (27 L. D., 57); and Richter *et al.* v. State of Utah (27 L. D., 95). In the first case it was held that lands chiefly valuable for deposits of marble are mineral in character; in the second, that lands containing a deposit of gyssum cement, and more valuable on that account than for agricultural purposes, are not subject to agricultural entry; and in the third, that lands wherein exist valuable deposits of guano are subject to entry as mineral land.

The distinction between the cases containing the rulings complained of and those cited by counsel as sustaining protestants' contention, is plainly apparent. Deposits, such as marble, gypsum cement, and guano, are classed by standard authorities on mining matters as mineral. On the other hand, no standard authority has been cited, nor has any been found, which in direct terms says that ordinary brick

clay is mineral, while it is a well known fact that such clay exists generally throughout the entire country, in quantities more or less varying, and that the lands where found, as a rule, are valuable for agricultural purposes.

Counsel for protestants state that no court in this country has held brick clay to be mineral. It is claimed, however, that in England judicial construction is to the effect that such substance is mineral. To sustain this latter statement but one case is cited, *viz.*, *Midland Railway Company v. Haunchwood Brick and Tile Company* (L. R., 20 ch., 552). This case does not support the statement, nor is it an authority upon the proposition advanced. The question whether or not brick clay is mineral, as the term is generally understood and accepted, was not involved, nor was it raised. The deposit which was the subject of the litigation, as appears from the statement of the case (p. 552), was a bed of brick and fire clay, while in the opinion of the court it is stated that the deposit "is a bed of clay used in making a peculiar kind of brick, and of some value, from the circumstance that it contains a certain amount of iron" (p. 560). The question involved and determined was whether or not the word "mines," as used in the 77th section of the Railways' Clauses Consolidation Act, 1845 (8 Vict. C., 20), included a bed of *brick* and *fire* clay which was being developed by *open* workings. The court held that such deposit worked in such manner was a "mine" within the meaning of the section. While in the opinion the court says that the word *minerals* means "primarily all substances (other than the agricultural surface of the ground) which may be got for manufacturing or mercantile purposes," such statement can not be accepted as authority in support of the proposition here advanced, *viz.*, that Congress intended lands which are of more value for their deposits of ordinary brick clay than for agricultural purposes should be dealt with and disposed of as mineral lands.

The long established rule of the Department is, that land of the character here involved is subject to agricultural entry. This rule has been generally accepted and acquiesced in. Unless clearly shown to be wrong in principle and in violation of both the letter and spirit of the mining laws, it should not be disturbed. In the opinion of the Department no reason exists which justifies its abrogation.

Your office decision holding said tract to be non-mineral in character is affirmed, and the protest accordingly dismissed.

KING ET AL. *v.* BRADFORD.

Motion for review of departmental decision of October 10, 1901, 31 L. D., 108, denied by Secretary Hitchcock December 30, 1901.

HOMESTEAD—SOLDIERS' ADDITIONAL—ASSIGNMENT.

ALTENBERG *v.* FOGARTY.

The regulation of the land department requiring assignment of soldiers' additional rights to be acknowledged, is a mere rule of evidence, and not a rule of law fixing what acts are essential to a valid assignment of such rights.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *October 14, 1901.* (J. R. W.)

Cos Altenberg appealed from your office decision of May 29, 1901, dismissing his contest against Edmond Fogarty's right, as assignee of Erasmus P. Cowart's additional homestead right, under Sec. 2306 of the Revised Statutes, to enter lots 1 and 2, Sec. 3, T. 28 N., R. 21 E., Helena, Montana.

September 17, 1898, Fogarty, as assignee of Sutton L. Fuller, intermediary assignee under an assignment purporting to be acknowledged August 31, 1898, before Asa B. Fuller, notary public, Cullman county, Alabama, made application to locate the right upon the lands above described. After notice by your office to Cowart and, at his instance, to Cos Altenberg, of Little Rock, Arkansas, March 23, 1899, Altenberg transmitted to your office an assignment by Cowart to him of the same right, dated January 12, 1899, claiming ownership of the right. June 6, 1899, Altenberg transmitted to your office his affidavit, on information and belief:

That the pretended assignment of Erasmus P. Cowart to Sutton L. Fuller, dated August 31, 1898, is fraudulent and void, there being no consideration for the same, and there having been no contract or agreement consummated by and between the parties for sale of soldier's claim, and that Fogarty's claim is predicated on the assignment of Cowart to Fuller, . . . that the said pretended assignment was not executed as the law directs, in this: It purports to have been executed before Asa B. Fuller, Notary Public, in and for Cullman Co., Alabama, August 31, 1898, when in truth and fact said Erasmus P. Cowart did not appear before Asa B. Fuller, Notary Public, August 31, 1898, in Cullman Co., Alabama, and did not acknowledge or execute assignment of soldier's additional homestead right before Asa B. Fuller, Notary Public, in Cullman Co., Alabama, at any time or before any officer authorized to take acknowledgment of written instruments.

May 12, 1899, there was filed the affidavit of Erasmus P. Cowart that—

I never was in Cullman County in my life, nor did I ever see Sutton L. Fuller in my life, neither did I ever receive any money from him for my claim. But I did sell, assign, and convey title to my claim and receive pay for same from a Mr. Cos Altenberg, for I assigned the papers before Notary J. B. Barclay. Asa B. Fuller came to see me about buying my claim, but never came back to complete it, and I supposed the proposed trade had fallen through, therefore sold to Cos Altenberg, and never would have known that Fuller had sold it as being his, if I had not been notified. I know Mr. Fuller has no right to it, but Mr. Altenberg has a right to it, for he paid me for it, and I made him a right to it.

Under direction of your office a hearing was had at the local office, the testimony being taken by depositions, both parties participating, and, July 9, 1899, the local office recommended that Fogarty's appli-

cation be rejected and that Cowart's assignment to Fuller be held void. Your office decision held the assignment to Fuller to be valid, dismissed Altenberg's claim of ownership of Cowart's right and approved Fogarty's location thereof.

The objections made to the validity of the assignment to Fuller are that the consideration (eighty dollars) was not paid, and that Asa B. Fuller, the notary who took the acknowledgment at Larkinsville, in Jackson county, Alabama, was appointed as a notary public in and for Cullman county, and not empowered to act as such officer in Jackson county.

The evidence shows that the assignment of August 31, 1898, by Cowart to Fuller, was in apt words to transfer his right, was made in the presence of two attesting witnesses—one of whom at least understood its purport to be an assignment of the right—Cowart's signature was genuine, and his delivery of the instrument was voluntary. It is, however, shown that Cowart was not in Cullman county, that no acknowledgment was or could have been made, or taken, there, and that the entire business was transacted in Jackson county, where the notary had no authority to act. *Edinburg Co. v. Peoples*, 102 Ala., 241. The certificate of acknowledgment, though good on its face, is therefore by the evidence discredited and shown to be void.

The regulations for assignment of soldiers' additional rights (Circular, July 11, 1899, p. 31), require that:

An assignee of an uncertified right desiring to make an additional entry under this section must present his application, as the assignee of the soldier, for a specific tract of land, to the register and receiver at the local office in whose jurisdiction the land lies, accompanying the same by a complete assignment, duly executed and acknowledged, as prescribed respecting the assignment of bounty land warrants.

The assignment of bounty land warrants is required to be acknowledged. (Circular, February 18, 1896, 27 L. D., 219.) There is no statute requiring such acknowledgment. The statute simply gives the right, and, that right being given without restriction, is held by the court to be, like any other unrestricted right of property, assignable. *Webster v. Luther* (163 U. S., 331). As the statute fixes no procedure, or form, by which the assignment shall be evidenced, it is within the powers of the land department to fix reasonable regulations for guidance of local officers as to what shall be recognized by them as sufficient evidence of such assignment. Such regulations are intended to avoid confusion and to facilitate their transaction of business. Your office properly held that:

The purpose of these requirements is not to prescribe an only mode of executing valid assignments. Nothing more was intended by them than to provide for satisfactory evidence of an assignment prior to the allowance of an additional entry by the assignee.

The regulation is no more than a rule of evidence for guidance of local and subordinate officers, and is not a rule of law fixing what acts are

essential to a valid assignment of the right, preventing your office from recognition of the validity of an assignment otherwise satisfactorily proved.

The additional right under section 2306 of the Revised Statutes, until fixed by location upon a particular tract of land, is a right merely, and not an interest in land. As to matters of form, or what constitutes an assignment of the interest, the law makes no provision. A writing of some kind, satisfactorily proven, would seem to be necessary, as the right is one that the assignor could not himself exercise except in writing. The Department, following *Webster v. Luther, supra*, has held that a power of attorney, coupled with an interest, is effective as an assignment.

The fact that Cowart voluntarily delivered to Fuller an assignment actually signed by him is satisfactorily proved. That no payment was made at the time did not invalidate it, nor does it appear that he ever demanded pay from Fuller. The agreed consideration was eighty dollars, and the evidence tends to show Fuller was not to make payment until the right had been recognized by the land department. The delivery of the assignment without payment in hand was of itself an extension of credit, and, if no fixed time for payment was agreed upon, such credit would continue and default of the purchaser could not be charged, or rescission of the assignment be made, until demand for payment. Without any such demand, he made a later assignment to Altenberg. Under such facts, the assignment prior in time must be held valid.

Fuller had acted promptly in endeavoring to obtain recognition of the right by the land department, as the assignment made August 31, was applied to be located September 17th the same year. There could, therefore, be no ground for rescission by Cowart because of delay. But irrespective of that fact, having given an assignment of his right, he could not make another without any act of rescission, warning, or notice to Fuller that it was, or was attempted to be, vacated and recalled.

Your office decision is affirmed.

ABANDONED MILITARY RESERVATION—HOMESTEAD APPLICATION.

ALLEN H. COX (ON RE-REVIEW).

The departmental order of June 13, 1899, did not contemplate the restoration of the lands in the Fort Hays abandoned military reservation to entry, but only to settlement; hence no legal claim attached by the tender of an application to enter said lands while such order remained in force or by an appeal from its rejection.

Departmental decisions of June 26, 1900, 30 L. D., 90, and January 30, 1901, 30 L. D., 468, recalled and vacated.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *October 15, 1901.* (G. B. G.)

This is the petition of the State of Kansas for a re-review of departmental decision of June 26, 1900 (30 L. D., 90), directing the allowance of the homestead application of Allen H. Cox, presented at the local office August 11, 1899, for lots 9, 10, and 11, and the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 4, T. 14 S., R. 18 W., Wakeeney land district, Kansas. A motion for review of said decision was denied January 30, 1901 (30 L. D., 468).

The petition was duly entertained May 14, 1901, and numerous other parties, claiming an interest in the land in controversy or in other lands occupying a similar or like *status* and under other homestead entries whose validity depends upon the correctness of the Department's decision in this case, were served with notice of said departmental order of May 14, 1901, and have answered urging that the decisions of the Department herein be not disturbed.

The land in controversy is within the limits of the abandoned Fort Hays military reservation. The reservation was established by executive order of August 28, 1868, and contains more than five thousand acres of land, and was, on October 22, 1889, turned over to this Department for disposal under the act of July 5, 1884 (23 Stat., 103). Section 2 of said act authorized the Secretary of the Interior to cause the lands in such military reservation either to be regularly surveyed or to be subdivided into tracts of less than forty acres each, and into town lots, or either, or both, and directed that he cause the lands so surveyed and subdivided, and each tract thereof, to be appraised, and that he should cause the said lands, subdivisions, and lots to be sold at public sale to the highest bidders for cash. By section 3 the Secretary of the Interior was directed to cause any improvements, buildings, building materials, and other property, which may be situate upon such lands, to be appraised in the same manner as provided for the appraisement of the lands, subdivisions, and lots, in any such reservation, and that he should cause the same, together with the tract or lot upon which they are situate, to be sold at public sale to the highest bidder for cash, or, in his discretion, cause the improvements to be sold separately, at public sale, for cash.

No steps were taken by the Department looking to the disposition of said land as provided by said act, and no appraisal of either the lands or the improvements thereon was ever made.

Such was the status of the land in said reservation when on August 23, 1894, Congress passed an act to provide for the opening of certain abandoned military reservations (28 Stat., 491), which is in full as follows:

That all lands not already disposed of included within the limits of any abandoned military reservation heretofore placed under the control of the Secretary of the Interior for disposition under the act approved July fifth, eighteen hundred and

eighty-four, the disposal of which has not been provided for by a subsequent act of Congress, where the area exceeds five thousand acres, except such legal subdivisions as have government improvements thereon, and except also such other parts as are now or may be reserved for some public use, are hereby opened to settlement under the public-land laws of the United States, and a preference right of entry for a period of six months from the date of this act shall be given all *bona fide* settlers who are qualified to enter under the homestead law and have made improvements and are now residing upon any agricultural lands in said reservations, and for a period of six months from the date of settlement when that shall occur after the date of this act: *Provided*, That persons who enter under the homestead law shall pay for such lands not less than the value heretofore or hereafter determined by appraisement, nor less than the price of the land at the time of the entry, and such payment may, at the option of the purchaser, be made in five equal installments, at times and at rates of interest to be fixed by the Secretary of the Interior.

Sec. 2. That nothing contained in this act shall be construed to suspend or to interfere with the operation of the said act approved July fifth, eighteen hundred and eighty-four, as to all lands included in abandoned military reservations hereafter placed under the control of the Secretary of the Interior for disposal, and all appraisements required by the first section of this act shall be in accordance with the provisions of said act of July fifth, eighteen hundred and eighty-four.

March 22, 1895, the Commissioner of the General Land Office withdrew the lands in this reservation by telegram, as follows:

MARCH 22, 1895.

Register and Receiver, Wakeeney, Kansas.

Fort Hays reservation temporarily withdrawn from settlement and entry. Allow no entry for said lands.

S. W. LAMOREUX,
Commissioner.

This withdrawal was made in anticipation of legislation by Congress donating the lands within said reservation to the State of Kansas for various public purposes. June 6, 1899, Congress not having in the meantime passed the anticipated legislation, your office, in a communication to the Department, said:

I see no reason why the lands may not be opened to settlement and entry under said act [act of August 23, 1894]. Before this is done, however, the buildings and other government improvements thereon should be disposed of under the provisions of section 3 of the act of July 5, 1884, *supra*. I, therefore, recommend the revocation of the order of suspension of March 22, 1895, and that this office be authorized to direct the appraisement of the property, after which proper steps will be taken in regard to its disposal.

Acting on this recommendation, the Department, on June 13, 1899, in a communication to your office (L. & R. Misc., 396, p. 305), said:

You have accordingly recommended that the order of March 22, 1895, be revoked, and that you be authorized to direct the appraisement of the property. In accordance with your recommendation, the above order of March 22, 1895, is hereby vacated, and you are directed to cause the property on the reservation to be appraised, with a view to its disposal under the act of July 5, 1884. This action will open to settlement under the act of 1894 all of the lands except those covered by improvements.

The letter of your office of June 21, 1899, communicating this order to the register and receiver of Wakeeney, Kansas, says:

I am in receipt of departmental letter of June 13, 1899, revoking said order

[order of withdrawal of March 22, 1895] and directing this office to cause the property on the reservation to be appraised, with a view to its disposal under the act of July 5, 1884. You will note on your records the revocation of said order of March 22, 1895. After the appraisal of the property shall have been made, and approved by the Secretary of the Interior, further instructions will be issued to you in regard to its disposal.

These were the conditions surrounding these lands when Allen H. Cox presented his homestead application for the land above described. This application was rejected by the local officers for the stated reason that the land applied for was in the Fort Hays abandoned military reservation. In a communication from the register of the local office to your office transmitting the application and appeal of Cox, it is said:

We have sixty-five similar applications to this filed for lands lying within the Ft. Hays abandoned military reservation, all of which we have rejected, and notified claimants giving them the right of appeal, and this office would appreciate an early decision in this case.

August 19, 1899, your office, answering an inquiry from the local officers whether homestead entries should be allowed to go to record for lands in said reservation, said that:

Under the operations of the act referred to [act of August 23, 1894, *supra*], and in view of departmental order of June 13, 1899, promulgated by letter "C" of June 21, 1899, the lands in the reservation not containing government improvements are subject to settlement. The Department in the order mentioned directed the appraisal of the property with a view to its disposal, under the act of July 5, 1884 (23 Stat., 103), stating that by such action the land not containing improvements would be subject to disposal under said act of August 23, 1894. While the lands are subject to settlement, as before mentioned, entries therefor cannot be made until after its appraisal, and the approval thereof by the Secretary of the Interior. Instructions will be issued to you on this subject after the appraisal has been made and approved.

By departmental order of August 24, 1899 (L. & R., 398, p. 472), said "reservation together with the improvements thereon" was again "temporarily withdrawn from disposal under the acts mentioned."

This order has never been revoked, and was in force March 28, 1900, when Congress passed an act (31 Stat., 52), granting to the State of Kansas the abandoned Fort Hays military reservation, with the proviso that the act "shall not apply to any tract or tracts within the limits of said reservation to which a valid claim has attached by settlement or otherwise, under any of the public land laws of the United States."

The question presented by the record, as stated, is, whether a valid claim attached to the land in controversy by virtue of the homestead application of Cox, presented August 11, 1899. In the decision under review this question was answered in the affirmative, and it was held that by reason of the presentation of such application, and by reason of the claim thereby initiated, said tract of land was excepted from the operation of the grant to the State. Upon a review and more careful consideration of the legislation affecting these lands, the orders

in relation thereto, and the action taken thereon, it is believed that the decision of the Department is erroneous. This reservation has occupied a *status* peculiar to itself, and the general practice and usual procedure in the disposition of abandoned military reservations under the act of 1894 were not followed in this case. In the disposition of abandoned military reservations under said act the lands therein, in instances where they had been surveyed prior to the establishment of the reservation, have been treated as subject to entry upon the passage of the act of 1894, and the appraisals therein provided for have been, in many instances, made after entries have been allowed. If the question were now being presented for the first time it might be doubted whether the act of 1894 intended that entry of such lands should be allowed in advance of their appraisal. But certainly it was within the competency of the land department to say that the lands within this reservation should be appraised before entries thereof would be allowed, and to require that part of the purchase price be paid before allowance of entry. Whatever may have been the practice in other cases, it is in keeping with good administration to require that before such entries should be allowed the lands should be appraised. When an entry is made, the entryman should know what he will have to pay for the land, when he will have to make payment, and what rate of interest must be paid upon deferred payments. This he can only know after the land has been appraised and the Secretary of the Interior has fixed the times for payment and the rate of interest.

A close examination of the orders relative to this reservation shows that it was not the intention of the Department, by the order of June 13, 1899, *supra*, to thereby restore these lands to entry. They had been withdrawn in terms from "settlement and entry," and the order of June 13, 1899, while revoking the order of withdrawal, declared the effect of this revocation to be to open the lands to "settlement." That your office understood that the order of June 13, 1899, did not restore said land to entry is clearly shown by your office letters to the local officers, hereinbefore quoted. And that the local officers understood it in the same way is evident from the fact that they rejected the homestead applications of Cox and others. It not being the intention of the Department, by its order of June 13, 1899, to restore these lands to entry, such was not the legal effect of that order. The land, therefore, was not subject to entry at the time of Cox's application, and a legal claim did not attach by the premature tender of that application or by the appeal from its rejection.

The former decisions of the Department herein are hereby recalled and vacated, and your office is directed to take steps, in accordance with this decision, to clear the record of all entries allowed of lands in said reservation resting alone upon applications presented at the local office between June 13, 1899, and August 24, 1899. This will also

apply to all subsequent entries resting only upon the relinquishment of applications presented between said dates. Entries allowed upon applications presented between said dates will be permitted to stand where based on actual settlement at the time of presentation.

RAILROAD GRANT—RIGHT OF WAY—ACTS OF MARCH 2, 1899, AND
MARCH 3, 1875.

REPUBLIC AND KETTLE RIVER RY. CO. *v.* WASHINGTON AND GREAT
NORTHERN RY. CO.

The approval of the Department of the Interior is necessary, under the provisions of the act of March 2, 1899, to the acquirement of a right of way by a proposed line of railroad over an Indian allotment, and to the privilege granted by the act of March 3, 1875, to use such a right in common with another company.

Secretary Hitchcock to the Commissioner of Indian Affairs, October 15,
(W. V. D.) 1901. (F. W. C.)

I have considered the matter of the protest by the Republic and Kettle River Railway Company against the approval of certain maps of location, filed by the Washington and Great Northern Railway Company, upon which is the line of its proposed road across certain Indian allotments in the north half of the late Colville Indian Reservation in the State of Washington.

Three separate maps of location, filed by the Washington and Great Northern Railway Company for approval under the act of March 2, 1899 (30 Stat., 990), were submitted with your office letter, dated September 5, last, in which you report that the located line shown upon two of said maps crosses, recrosses, and parallels, the line of location of the Republic and Kettle River Railway Company, shown upon maps of location filed by the last-mentioned company under the act of March 2, 1899, *supra*, and approved April 23, last. You therefore recommend that the Washington and Great Northern Railway Company be required to furnish satisfactory evidence that public interest will be promoted by the construction of its line of road as shown upon these two maps, before the same are approved. There appears to be no objection to the other map, and you recommend that the same be approved.

The Republic and Kettle River Company has made due payment to the Indian allottees, over whose lands its proposed line of road extends, and said company claims to have spent large sums of money in grading and other work preliminary to the actual operation of its road along the line as shown upon the maps approved by this Department, and that company urges that, on account of the topography of the country traversed by these proposed lines of road and the narrow valleys through which they must follow the water courses, it is impracticable

to build more than one line of road in that vicinity, and for that reason asks that the approval of the Department be not given to the maps of location filed by the Washington and Great Northern Railway Company.

Section 6 of the act of March 2, 1899, *supra*, under which each of these companies is claiming a right of way over these Indian allotments, provides:

That the provisions of section two of the act of March third, eighteen hundred and seventy-five, entitled "An act granting to railroads the right of way through the public lands of the United States," are hereby extended and made applicable to rights of way granted under this act and to railroad companies obtaining such rights of way.

Section 2 of the act of March 3, 1875, is as follows:

That any railroad company whose right of way, or whose track or road-bed upon such right of way, passes through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road or highway is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road: *Provided*, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile.

From a careful consideration of these statutes, I am of opinion that, where the proposed line of road crosses an Indian allotment, the approval of this Department under the provisions of the act of March 2, 1899, *supra*, is necessary to the acquirement of a right of way over the same, and to the privilege granted by the act of March 3, 1875, *supra*, to use such a right in common with another company.

It satisfactorily appears that public interests will be promoted by the construction and operation of the line of the Washington and Great Northern Railway Company, as shown on its maps of located road under consideration, and I have therefore approved the same, subject to the rights of the Republic and Kettle River Railway Company under the act of March 2, 1899, and section 2 of the act of March 3, 1875. This will protect the Republic and Kettle River Company in its existing rights and will enable the Washington and Great Northern Company in constructing and operating its proposed line of road to obtain the privileges or benefits extended by section two of the act of 1875.

As thus approved, the maps are herewith returned, together with the papers.

MINING CLAIM—SURVEY—PATENTED CLAIMS.

THE MONO FRACTION LODE MINING CLAIM.

The land department is without the jurisdiction or authority to correct mistakes, after patent, in the survey of a mining claim, as long as the patent remains outstanding. A mining claim legally located may be surveyed according to the lines of the location as marked on the ground, even though the surveyed lines may in part or in whole fall upon lands patented prior to the survey. A patent issued upon such a survey should exclude all lands within the lines of the survey which are also included in the prior patent.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *October 16, 1901.* (A. B. P.)

The Deadwood Terra Mining Company has appealed from your office decision of March 20, 1901, whereby the action of the United States surveyor-general of South Dakota, refusing to approve mineral survey No. 1416, Huron series, of the Mono Fraction lode mining claim, was affirmed.

The refusal of the surveyor-general to approve the survey is based upon the ground that the claim as surveyed is in conflict with a number of previously patented mining claims, as described in the patents embracing them.

In your said office decision it is stated that—

A careful examination of said plat and field notes shows that said mining claim was surveyed in strict accordance with the location notice and also in strict accordance with the claim as actually staked upon the ground.

The appellant company contends, in substance, that inasmuch as the survey conforms to the boundaries of the claim as described in the location notice and as actually staked on the ground, the same is a proper survey and should be approved; that the stated conflicts are the result of errors of description in the approved surveys of the patented claims, which errors were carried into the patents; that if the patented claims were described as actually located and marked by stakes and monuments on the ground there would be no conflict between them and the Mono Fraction survey; that stakes and monuments on the ground should control as against the descriptions given in the surveys of the patented claims and in the patents; and it should be held, therefore, that no patent has been legally granted for any of the land embraced within the lines of the survey in question.

To the extent that these contentions are based upon the claim or theory that the land department, notwithstanding the existence of the outstanding patents referred to, may deal with lands included within the descriptions contained in the patents as unpatented lands, they can not be sustained. The patents were issued upon approved surveys and in conformity therewith. The land department is without the

jurisdiction or authority to correct any mistakes that may have been made in the surveys, as long as the patents remain outstanding. Nor can a patent be lawfully issued for lands already patented to other persons.

It is not intended hereby to hold, however, that a mining claim legally located may not be surveyed according to the lines of the location as marked on the ground, even though the surveyed lines may in part or in whole fall upon patented lands. Such a survey would be regular and lawful as a basis for patent provided sufficient data be furnished thereby, or by the records of the surrounding or overlapping patented claims considered in connection therewith, to enable the government in issuing its patent to make proper exclusion from the patent of all previously patented lands embraced within the exterior lines of the survey.

If the survey here in question, when considered in connection with the records of the outstanding patents embracing the surrounding or overlapping claims, shall be found to furnish sufficient data upon which to base a patent for the Mono Fraction claim with proper exclusion of all lands within the lines of the survey, which are also included in the outstanding patents, it should be approved if in other respects regular. Otherwise it can not be approved.

As the Department is without the necessary information to determine this question upon the present appeal, the record is returned to your office with direction that the matter be adjudicated in conformity to the views herein expressed. The decision appealed from is accordingly modified.

REPAYMENT—CANCELED PRE-EMPTION DECLARATORY STATEMENT.

MAGGIE WYNNE.

The filing of a pre-emption declaratory statement is not an entry within the meaning of the repayment act; hence repayment of the fees and commissions paid on such statement can not be allowed.

Acting Secretary Campbell to the Commissioner of the General Land
(W. V. D.) *Office, October 22, 1901.* (C. J. G.)

The land involved herein is the NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, and S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 33, T. 11 N., R. 19 W., Missoula, Montana, land district.

February 20, 1901, Maggie Wynne was allowed to file a declaratory statement for said land under the act of June 5, 1872 (17 Stat., 226), which, among other things, provides:

SEC. 2. That as soon as practicable after the passage of this act, the surveyor-general of Montana Territory shall cause to be surveyed . . . the lands in the Bitter Root valley lying above the Lo-Lo fork of the Bitter Root river; and said lands shall be

open to settlement, and shall be sold in legal subdivisions to actual settlers only, . . . at the price of one dollar and twenty-five cents per acre, payment to be made in cash within twenty-one months from the date of the settlement, or the passage of this act.

November 22, 1899, the Northern Pacific Railroad Company filed a list of lands within the primary limits of the grant for its road, including the land here in question, which was rejected by the local officers, because, in their judgment, said lands were within the Bitter Root reservation. Upon appeal by the company, your office, on April 13, 1901, reversed the action of said officers, for the reason that said lands are not within the reservation, and held Wynne's declaratory statement for cancellation, which was canceled July 16, 1901, for conflict with the prior grant for the railroad, no other payment having been made by Wynne than the fees and commissions paid upon filing her declaratory statement.

May 31, 1901, Wynne made application for repayment of said fees and commissions, which was denied by your office July 17, 1901, on the ground that a declaratory statement is not an entry within the meaning of the repayment act, the case of William F. Allen (29 L. D., 660) being cited.

Section 2 of the act of June 16, 1880 (21 Stat., 287), reads as follows:

In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and can not be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excess paid upon the same upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office.

The case cited by your office is not regarded as controlling in this case, for the reason that it refers to a special act providing for the location and reservation of public lands for reservoir sites. It has uniformly been held by the land department, however, that the filing of a pre-emption declaratory statement is not an entry of the land. (John C. Angell, 24 L. D., 575, 577; and William H. Conley, 30 L. D., 255.) This being true, it must be held that Wynne's case is not within the terms of the repayment act.

The judgment of your office, denying repayment, is affirmed.

JOSHUA L. SMITH.

Motion for review of departmental decision of August 5, 1901, 31 L. D., 57, denied by Secretary Hitchcock October 24, 1901.

RAILROAD GRANT—ADDITIONAL STATION GROUNDS—ACT OF APRIL 25, 1896.

ST. LOUIS, OKLAHOMA AND SOUTHERN RY. CO.

The act of April 25, 1896, provides for the acquirement of additional grounds "at stations *now existing* or for the establishment of new stations or depots"; hence applications for additional grounds at stations not existing at the time of the passage of said act can not be allowed.

Secretary Hitchcock to the Commissioner of Indian Affairs, October 26, 1901. (W.V. D.) (F.W. C.)

With your office letter of July 22, last, were transmitted the several applications made by the St. Louis, Oklahoma and Southern Railway Company, and the showings made in support thereof, together with the report of the Indian agent thereon, for additional lands selected under the provisions of the act of April 25, 1896 (29 Stat., 109), at the following named places: Ada, Roff, Ravia, Holdenville, Alabama, Henryetta, Okmulgee, Mounds, Beggs, Flat Rock, Platter, Wetumka, Foster, Francis, Randolph, Helen, Mill Creek, Woodville, Scullin, Troy, Fitzhugh, and Sapulpa.

This company obtained its right of way through the Indian Territory, and station grounds at many of the points named, under the act of Congress approved March 30, 1896 (29 Stat., 80), and at these places the lands now sought are additional station grounds. At some of the points named, however, the company did not and could not acquire the lands under the said act of March 30, 1896, and at these points the applications are for new stations.

Your said office letter finds that this railroad company completed the construction of its road and was in active operation thereof in March, 1901.

The act of April 25, 1896, *supra*, under which the applications under consideration were made, provides for the acquirement of additional grounds "at stations *now existing* or for the establishment of new stations or depots."

This company did not have any existing station at any of the points named, or elsewhere in the Indian Territory, at the time of the passage of said act, and hence is not seeking and can not acquire any ground as additional to a then existing station at any of said points. So far, therefore, as the company is seeking additional station grounds, these applications must be rejected. See departmental decision of June 22,

last, upon application of the Western Oklahoma Railroad Company for additional station grounds at Ardmore, Indian Territory.

In so far as the company is seeking to acquire additional lands for "new stations or depots," a matter not specifically considered or reported on in your said office letter, it is directed that the applications be again submitted with your recommendation thereon.

MINERAL LAND—INDIAN ALLOTMENT—ACT OF JUNE 6, 1900.

ACME CEMENT AND PLASTER COMPANY.

Lands which have been allotted to Indians, or to which a homestead entryman has acquired fixed and vested rights by reason of his compliance with the homestead laws, are not subject to the mining laws or to mineral exploration and entry.

From the time of the passage of the act of June 6, 1900, the body of lands which were to be allotted or opened to settlement thereunder were subjected to the mining laws, and to mineral exploration and entry, so far as the same should be found to contain valuable mineral deposits; but such lands were to be subject to the mining laws, or to mineral exploration and entry, only so long as they should remain free from any vested right of individual ownership.

Upon the allotment of said lands in severalty, or upon title thereto being earned by a homestead entryman by compliance with the homestead law, the lands allotted, or embraced in a homestead entry, cease to be subject to the mineral provision of said act.

Valuable mineral deposits which may be found upon land allotted in severalty to an Indian under the act of June 6, 1900, are not withheld from the allottee or reserved to the United States, and can not be acquired under the mining law; but such land may, with the approval of the Secretary of the Interior, be leased by the allottee under the general statute relating to the giving of mining leases by Indian allottees.

Assistant Attorney General Van Devanter to the Secretary of the Interior, October 28, 1901. (W. C. P.)

The Acme Cement and Plaster Company having proposed to lease certain lands, allotted to members of the Comanche, Kiowa, and Apache Indians, for the mining of gypsum, the matter has been referred to me for opinion as to whether there is authority in law for leasing these minerals, in view of that provision of the act of June 6, 1900 (31 Stat., 672, 680), which reads as follows:

That should any of said lands allotted to said Indians or opened to settlement under this act contain valuable mineral deposits, such mineral deposits shall be open to location and entry, under the existing mining laws of the United States, upon the passage of this act; and the mineral laws of the United States are hereby extended over said lands.

Stated in other words the question is, Does this mineral provision have the effect of withholding from the allottee and reserving to the United States all valuable mineral deposits, which may at any time be found in the allotted land?

The allotments were made in pursuance of the agreement, "accepted, ratified, and confirmed as herein amended" by the act of June 6, 1900. By that agreement the Indians ceded, conveyed, and surrendered all their claim and title to a certain tract of land therein described. That cession was made subject to the allotment of land in severalty to the individual members of said tribes as in said agreement provided, and subject to other conditions and payments therein named. The provisions as to allotments are that each member shall have the right to select an allotment of 160 acres; and

When said allotments of land shall have been selected and taken as aforesaid, and approved by the Secretary of the Interior, the titles thereto shall be held in trust for the allottees, respectively, for the period of twenty-five (25) years, in the time and manner and to the extent provided for in the act of Congress entitled "An act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and Territories over the Indians, and for other purposes," approved February 8, 1887, and an act amendatory thereof, approved February 28, 1891.

And at the expiration of the said period of twenty-five (25) years the titles thereto shall be conveyed in fee simple to the allottees or their heirs, free from all incumbrances.

That act also provided—

That the lands acquired by this agreement shall be opened to settlement by proclamation of the President within six months after allotments are made, and be disposed of under the general provisions of the homestead and town-site laws of the United States.

In a later paragraph appears the provision quoted in your note of reference, as hereinbefore set forth.

Under the act of June 6, 1900, the act of January 4, 1901 (31 Stat., 727), and the act of March 3, 1901 (31 Stat., 1093, 1094), the allotments in severalty to the Indians were made and approved, and the President's proclamation was issued July 4, 1901, declaring that the lands ceded by said agreement, excepting certain classes thereof, among them being "lands allotted in severalty to individual Indians," would, on August 6, 1901, in the manner therein prescribed, be opened to entry and settlement and to disposition under the general provisions of the homestead and town-site laws.

The time when the mineral deposits were to be open for location and entry is fixed by the phrase "upon the passage of this act," and this is intensified by the provision "and the mineral laws of the United States are *hereby* extended over said lands." These are words of present import, indicating that the law was to operate at once upon the lands to be affected thereby. This language is plain and unambiguous, leaving no room for doubt as to its meaning and consequently no necessity for interpretation. The lands upon which the law was to operate are described in the words "lands allotted to said Indians or open to settlement under this act." If these words are to be taken in their ordinary sense and as describing the condition of the lands

upon which the law was to have immediate operation, they are meaningless and without effect, because none of the lands had been allotted to said Indians or opened to settlement at that time. The act did not itself allot any lands to Indians or open any lands to settlement, nor could any lands have been so allotted or opened "under this act" prior to its passage. If this phrase, "allotted to said Indians or opened to settlement," is to be taken literally as describing the condition in which the lands must be to be affected, and as indicating that when the lands reach that condition the mining provision is to become operative, the phrase is in conflict with the clear and certain phrases indicating that the provision was to have effect upon the passage of the act. Literally read, the two branches of the provision—the one fixing the time at which and the other the land upon which it was to operate—are therefore inharmonious and incapable of reconciliation. It must then be examined in the light of other provisions in the act to ascertain if the apparently conflicting portions of this provision are not capable of a construction which will give the whole of the paragraph effect. Literally read, the paragraph is also irreconcilably in conflict with the provision of Article V of said agreement regarding the title and right of the allottees in their respective allotments, is inharmonious with the policy of the government toward the Indians, as evidenced by the whole system of legislation affecting allotments in severalty, and is obnoxious to all right ideas of justice to and fair dealing with the Indians.

One of the considerations promised the Indians for the cession of valuable rights by the tribe was that each individual should receive one hundred and sixty acres of land, to be conveyed to him in fee simple, free from all incumbrances. The only limitation upon that right of selection, found in the agreement, is in the provision that no person shall make his selection of land in any part of said reservation used or occupied for "military, agency, school, school farm, religious, or other public uses, or in section sixteen (16) and thirty-six (33), in each Congressional township," except where he may have theretofore made improvements upon and then occupied a part of said sections sixteen and thirty-six. A construction of this provision of the law which would impute to Congress the intention of violating the promises upon which a cession of these lands was obtained, and which would work an irreparable injury, should not be entertained if there be any other not in conflict with the recognized canons of construction.

Looking outside of the mineral provision we find that other portions of the act direct that, subject to certain reservations therein declared, the ceded lands shall be allotted in severalty to the Indians so far as necessary to give each the requisite acreage, and that the lands remaining unallotted shall be open to settlement. Thus there were lands *to be* allotted to the Indians or opened to settlement under said act. This

indicates that the words "allotted" and "opened" in the mineral provision were used as referring to the future instead of to the past. Understood in this sense, there was, at the time of the passage of the act, something upon which they could operate. Words which, according to their letter, have reference to past transactions may be and should be read as referring to the future when necessary to harmonize provisions which would otherwise be conflicting and to give effect to portions of a statute which would otherwise be meaningless. (*Heydenfeldt v. Daney Gold and Silver Mining Co.*, 93 U. S., 634, 639.) A consideration of the entire act and of the policy of the government in dealing with Indian allotments and with mineral deposits in public lands requires that the mineral provision be read as if referring to the lands which were *to be* "allotted to said Indians, or opened to settlement under this act." Read in this sense, it harmonizes with the words "upon the passage of this act," "hereby," and "under this act," in the mineral provision, harmonizes with the provision of Article V respecting the title and right of the allottees to their respective allotments, and gives to the mineral provision a common sense and just operation in harmony with the system of legislation affecting allotments in severalty and with the general operation of the mining laws upon public lands.

Understood in this sense, the mineral provision does not subject to the mining laws or to mineral exploration or entry lands which have been allotted to Indians or lands to which a homestead entryman has acquired fixed and vested rights by reason of his compliance with the homestead laws. Understood in this sense, that provision, from the time of the passage of the act, subjected to the mining laws and to mineral exploration and entry the body of lands which were to be allotted or opened to settlement under said act so far as the same should be found to contain valuable mineral deposits. Even these lands were not always to be subject to the mining laws or to mineral exploration and entry, but, like other lands, only so long as they should remain free from any vested right of ownership in an individual, Indian or white. Upon their allotment in severalty or upon title thereto being earned by a homestead entryman by compliance with the homestead law, the lands allotted or embraced in the homestead entry cease to be subject to statutes, like this mineral provision, which prescribe the manner of disposing of public lands.

I am therefore of opinion that valuable mineral deposits which may be found upon land allotted in severalty to an Indian under said act are not withheld from the allottee or reserved to the United States, and that they can not be acquired under the mining law, but that such land may, with your approval, be leased by the allottee under the general statute relating to the giving of mining leases by Indian allottees.

Approved October 28, 1901:

E. A. HITCHCOCK, *Secretary*.

HOMESTEAD—ADDITIONAL—SECTION 5, ACT OF MARCH 2, 1889.

MILLER v. NORTHERN PACIFIC RY. CO.

A married woman is not disqualified to make additional entry under section 5 of the act of March 2, 1889, where prior to the passage of said act, and when possessing the necessary qualifications, she made her original entry and submitted final proof thereon showing due compliance with law.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) October 29, 1901. (F. W. C.)

Maria Miller has appealed from your office decision of May 15, last, rejecting her application to make additional homestead entry, under the provisions of section 5 of the act of March 2, 1889 (25 Stat., 854), for the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$, Sec. 29, T. 135 N., R. 4 W., St. Cloud land district, Minnesota, for the reason that at date of the tender of her said application, April 10, 1895, she was not qualified to make entry under the homestead law, being a married woman.

This tract is within the indemnity limits of the grant made in aid of the construction of the Northern Pacific railroad and was included in a list of selections, filed on account of said grant, July 16, 1885. This list was not accompanied by a designation of lost lands as a basis for the selections, but the same was supplied in a list filed April 26, 1892.

From the statement of facts contained in your said office decision it appears that Maria Herckenrath, now Maria Miller, made homestead entry No. 2855 on July 8, 1874, for the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 20, T. 135 N., R. 45 W., adjoining the land here in question, upon which she made final proof and final certificate issued August 16, 1881.

The fifth section of the act of March 2, 1889, *supra*, under which the application under consideration is made, provides:

That any homestead settler who has heretofore entered less than one-quarter section of land may enter other and additional land lying contiguous to the original entry, which shall not, with the land first entered and occupied, exceed in the aggregate one hundred and sixty acres, without proof of residence upon and cultivation of the additional entry; and if final proof of settlement and cultivation has been made for the original entry, when the additional entry is made, then the patent shall issue without further proof: *Provided*, That this section shall not apply to or for the benefit of any person who at the date of making application for entry hereunder does not own and occupy the lands covered by his original entry: *And provided*, That if the original entry should fail for any reason, prior to patent, or should appear to be illegal or fraudulent, the additional entry shall not be permitted, or if having been initiated, shall be canceled.

Where, prior to said act, entry had been made under the homestead law, by a qualified homestead settler, for less than one-quarter section, and proof had been made thereon showing due compliance with law, such person was granted a right to enter additional contiguous land, in

the aggregate not to exceed one hundred and sixty acres, without proof of residence on or cultivation of such additional land, provided the person at the date of making application for the additional land was still the owner of and occupying the land covered by the original entry.

The showing in support of the present application meets all these requirements, and in the opinion of this Department the fact that at the date of her application to make additional entry she was a married woman, and therefore would not have been entitled to initiate an original entry under the homestead law, did not dispossess her of her right to the additional entry granted by said section. The case of *Heath v. Hallinan* (29 L. D., 267), referred to in your office decision, is therefore not in point.

Your office decision rejecting Miller's application is, therefore, reversed. Thus considered it appears that the conflicting claims to this land are subject to adjustment under the provisions of the act of July 1, 1898 (30 Stat., 597, 620), and the record is herewith returned for disposition of said conflicting claims under the provisions of said act.

SALINE LAND—NON-SALINE AFFIDAVIT.

CIRCULAR.

Circular relative to non-saline affidavits to be required in applications to enter public lands under the homestead and other laws providing for the disposal of non-mineral lands in States and Territories excluded by statute from the operation of the general mining laws, approved, and directions given for the amendment of the regular non-mineral affidavit by inserting therein a non-saline clause.

Secretary Hitchcock to the Commissioner of the General Land Office.
(W. V. D.) November 14, 1901. (A. B. P.)

The Department is in receipt of your communications of October 12 and November 14, 1901, submitting a proposed circular of instructions to registers and receivers in the matter of non-saline affidavits to be required in applications to enter public lands under the homestead and other laws providing for the disposal of non-mineral lands in States and Territories excluded by statute from the operation of the general mining laws and in which the regular non-mineral affidavit (form 4-062) is not required, and recommending that said regular non-mineral affidavit be amended by inserting therein, at the proper place, the words:

That the land contains no salt spring, or deposits of salt in any form sufficient to render it chiefly valuable therefor.

The proposed circular has been approved, and the same is herewith returned. Your recommendation as to the amendment of the regular non-mineral affidavit in the manner stated is also approved, and you

are authorized to make such amendment and to require the amended affidavit to be used in all future non-mineral entries in States and Territories where the general mining laws are applicable.

SALINE LANDS—NON-SALINE AFFIDAVITS—NON-MINERAL LANDS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 14, 1901.

Registers and Receivers, United States District Land Offices.

GENTLEMEN: Your attention is called to an act of Congress approved January 31, 1901 (31 Stat., 745), which declares:

That all unoccupied public lands of the United States containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, are hereby declared to be subject to location and purchase under the provisions of the law relating to placer mining claims: *Provided*, That the same person shall not locate or enter more than one claim hereunder.

You will hereafter require persons making applications to enter or locate public lands under the homestead or other laws providing for the disposal of lands not mineral in character, in States and Territories excluded by statute from the operation of the general mining laws, to furnish an affidavit showing that the land applied for contains no salt springs or deposits of salt in any form, sufficient to render it chiefly valuable therefor.

Very respectfully,

BINGER HERMANN,
Commissioner.

DEPARTMENT OF THE INTERIOR, *November 14, 1901.*

Approved:

E. A. HITCHCOCK, *Secretary.*

SALINE LANDS—MINING LAWS—ACT OF JANUARY 31, 1901.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 13, 1901.

Registers and Receivers, District Land Offices,

GENTLEMEN: Your attention is directed to the following act of Congress, approved January 31, 1901 [31 Stat., 745], extending the mining laws to saline lands:

An Act Extending the Mining Laws to Saline Lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all unoccupied public lands of the United States containing

salt springs, or deposits of salt in any form, and chiefly valuable therefor, are hereby declared to be subject to location and purchase under the provisions of the law relating to placer-mining claims: *Provided*, That the same person shall not locate or enter more than one claim hereunder.

Approved January 31, 1901.

1. Under this act the provisions of the law relating to placer mining claims are extended to all States and Territories and the District of Alaska, so as to permit the location and purchase thereunder of all unoccupied public lands containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, with the proviso, "That the same person shall not locate or enter more than one claim hereunder."

2. Rights obtained by location under the placer mining laws are assignable and the assignee may make the entry in his own name; so, under this act a person holding as assignee may make entry in his own name, provided he has not held under this act, at any time, either as locator, assignee or entryman, any other lands; his right is exhausted by having held under this act any particular tract, either as locator, assignee or entryman, either as an individual or as a member of an association. It follows, therefore, that no application for patent or entry, made under this act, shall embrace more than one single location.

3. In order that the conditions imposed by the proviso, as set forth in the above paragraph, may duly appear, the notice of location presented for record, the application for patent and the application to purchase, must each contain a specific statement under oath by each person whose name appears therein that he never has, either as an individual or as a member of an association, located, applied for, entered, or held any other lands under the provisions of this act. Assignments made by persons who are not severally qualified as herein stated will not be recognized.

BINGER HERMANN, *Commissioner*.

DEPARTMENT OF INTERIOR, *February 13, 1901.*

Approved:

E. A. HITCHCOCK, *Secretary*.

PRIVATE CLAIM—SURVEYOR-GENERAL'S CERTIFICATE—ACT OF MARCH 2, 1889.

J. L. BRADFORD.

The right to locate surveyor-general's scrip on land subject to sale at private entry at \$1.25 per acre, conferred by the special act of June 2, 1858, is in no wise affected by the general provisions of the act of March 2, 1889, or the absence of a restoration notice, where after the passage of said act the land may have been included in a homestead entry that is subsequently canceled.

*Secretary Hitchcock to the Commissioner of the General Land Office,
November 14, 1901.*

(W. V. D.)

(A. S. T.)

I am in receipt of your letter of October 7, 1901, enclosing the application of J. L. Bradford to locate the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 7, T. 14 N., R. 5 W., La. Mer., New Orleans land district, Louisiana, containing 39.33 acres, with surveyor-general's certificate No. 973 "F" for 43.40 acres, under section 3, of the act of June 2, 1858 (11 Stat., 294), and requesting instructions from this Department with reference to certain matters relative to said application.

After quoting from the decision rendered by this Department on June 5, 1901, in the case of Victor H. Provensal (30 L. D., 616), you say:

The question is whether the application herewith for land which is now vacant, but which was included in homestead entries, and which has not been re-offered, in view of prohibitory legislation, falls within the same rule as that obtaining in the Provensal case.

The statute under which this application is made is the same under which Provensal made his application, and the various statutes and decisions cited and construed in that case are equally applicable to the present case.

The third section of the act of June 2, 1858, *supra*, provides that such surveyor-general's certificates "may be located upon any of the public lands of the United States subject to sale at private entry at a price not exceeding one dollar and twenty-five cents per acre."

By the act of March 2, 1889 (25 Stat., 854), it is provided that: "From and after the passage of this act, no public lands of the United States, except those in the State of Missouri, shall be subject to private entry."

The question in the Provensal case was, whether or not said act of March 2, 1889, prohibiting further private entries of the public lands, had the effect to repeal that portion of the act of June 2, 1858, that permitted such certificates to be located upon public lands elsewhere than in the State of Missouri, since, under the act of March 2, 1889, there are no public lands subject to private entry except in the State of Missouri; and it was held in that case that the act of March 2, 1889, was intended only to prohibit private cash entries on the public lands, and did not affect the rights of those holding such certificates to locate the same upon any lands which would have been subject to such location if that act had not been passed.

It appears that the land applied for in this case, after having been offered at public sale and becoming subject to private cash entry at one dollar and twenty-five cents per acre, was twice segregated from the public domain by homestead entries, subsequently canceled, and that under a regulation of the Department, obtaining for many years,

it was necessary, before lands so segregated from the public domain and withdrawn from private cash entry could again be subjected to such entry, that publication be made for at least thirty days, notifying the public that such lands would, at a given time, become subject to private cash entry at not less than one dollar and twenty-five cents per acre. This notice was never published with reference to the land in question after the cancellation of said homestead entries, and hence, under said regulation, it would not thereafter have been subject to private cash entry had the act of March 2, 1889, not been passed.

But the purpose of the regulation requiring the publication of this notice of restoration was to afford a fair and equal opportunity to all who might wish to make private cash entries for such lands. It was not intended to affect the disposition of the land by other means than private cash entry, and, therefore, after the passage of the act of March 2, 1889, prohibiting further private cash entries, there was no longer any necessity for the regulation; and the fact that such notice was not published with reference to the land in question does not affect the rights of those holding such surveyor-general's certificates to locate such lands therewith.

The land described in the application accompanying your letter was, at the time of the passage of the act of March 2, 1889, "offered" land and subject to private cash entry at not less than one dollar and twenty-five cents per acre. It was therefore subject to such location as here applied for; or it might have been disposed of under the homestead law, or in any other lawful manner. The object and purpose of the act of March 2, 1889, were to prohibit further private cash entries on the public lands, and not to interfere with the disposition of such lands by any other mode, and, therefore, it did not take the land in question out of the category of "offered" lands within the meaning of the act of June 2, 1858; therefore, for the purposes of the latter act, it remained as offered land after the passage of the act of March 2, 1889.

The homestead entries were made subsequent to the act of March 2, 1889. Though the land was not, at that time, subject to private cash entry at one dollar and twenty-five cents per acre, the making of the homestead entries did not change its status as offered land within the meaning of the act of June 2, 1858, but did, during their continuance, prevent the disposition of it by any other means, and the cancellation of the homestead entries restored the land to the same condition in which it was before they were made, and no order or publication of notice was necessary for that purpose.

MINERAL LAND—NON-MINERAL AFFIDAVIT—MISSISSIPPI, LOUISIANA,
ARKANSAS, FLORIDA.

INSTRUCTIONS.

Directions given that in all non-mineral entries of lands in the States of Mississippi, Louisiana, Arkansas, and Florida the same non-mineral affidavit be required, before the entry is permitted to go of record, as is required in other States to which the mining laws are applicable.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) November 14, 1901. (A. B. P.)

By letter of May 27, 1901, you transmitted, for the consideration and approval of the Department, a draft of a proposed circular of instructions to be directed to the local land officers in the State of Louisiana, requiring non-mineral affidavits to be furnished by all applicants to make entry of the public lands in said State under other than the mining laws of the United States.

By act of June 21, 1866 (14 Stat., 66), Congress declared that the public lands in the States of Alabama, Mississippi, Louisiana, Arkansas, and Florida should be disposed of under the homestead law only; with the proviso "That no mineral lands shall be liable to entry and settlement under its provisions." This act was subsequently carried into sections 2302 and 2303 of the Revised Statutes, being part of the homestead law set forth in chapter 5 of title 32. Those sections read:

Sec. 2302. No distinction shall be made in the construction or execution of this chapter, on account of race or color; nor shall any mineral lands be liable to entry and settlement under its provisions.

Sec. 2303. All the public lands in the States of Alabama, Mississippi, Louisiana, Arkansas, and Florida shall be disposed of in no other manner than according to the terms and stipulations contained in the preceding provisions of this chapter.

By section 2318 of the Revised Statutes (Act July 4, 1866, Sec. 5; 14 Stat., 85-86), it is declared that—

In all cases lands valuable for minerals shall be reserved from sale, except as otherwise directed by law.

By acts of July 26, 1866 (14 Stat., 251), July 9, 1870 (16 Stat., 217), May 10, 1872 (17 Stat., 91), March 3, 1873 (17 Stat., 607), and sections 2319 to 2352, inclusive, commonly designated as the United States mining laws, "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed," were "declared to be free and open to exploration and purchase, by citizens of the United States and those who have declared their intention to become such," etc., and provision was made for the disposal of such lands.

By acts of February 18, 1873 (17 Stat., 465; Sec. 2345, R. S.), and May 5, 1876 (19 Stat., 52), the States of Michigan, Wisconsin, Minnesota, Missouri, and Kansas were excluded from the operation of said mining laws.

By act of July 4, 1876 (19 Stat., 73), it was enacted:

That section two thousand three hundred and three of the Revised Statutes of the United States, confining the disposal of the public lands in the States of Alabama, Mississippi, Louisiana, Arkansas, and Florida to the provisions of the homestead law, be, and the same is hereby, repealed.

By act of March 3, 1883 (22 Stat., 487), it was provided:

That within the State of Alabama all public lands, whether mineral or otherwise, shall be subject to disposal only as agricultural lands.

It is clear, from the foregoing, that at least since the act of July 4, 1876, whereby section 2303 of the Revised Statutes was repealed, the United States mining laws have been in force as to all public lands valuable for minerals in the States of Mississippi, Louisiana, Arkansas, and Florida, the same as in other public-land States, except those excluded by the acts of February 18, 1873, and May 5, 1876; and that said laws were in force in the State of Alabama, at least from July 4, 1876, until the passage of the act of March 3, 1883. A non-mineral affidavit, in case of a homestead or other agricultural entry, is just as necessary, under the law, in the States of Mississippi, Louisiana, Arkansas, and Florida as in any other of the public-land States to which the mining laws are applicable.

For the future guidance of the local officers in the States of Mississippi, Louisiana, Arkansas, and Florida, you are directed to furnish said officers with copies of this decision; and you will hereafter, in all non-mineral entries of lands in said States, require that the usual non-mineral affidavit (form 4-062) be filed before the entry is permitted to go of record, the same as required in other States to which the mining laws are applicable. (See General Circular, July 11, 1899, p. 87.)

It appearing that heretofore the practice has been not to require non-mineral affidavits in agricultural entries of lands in some of said States, the negative answers of applicants and witnesses on final proof to questions as to whether there were any indications of coal, salines, or minerals of any kind in the lands having been deemed a sufficient showing that the lands were non-mineral in character, it is directed that all such entries heretofore allowed, or which may be hereafter allowed prior to the receipt of notice of this decision at the local land offices in said States, shall be adjudicated under the practice which heretofore existed.

TIMBER-CULTURE ENTRY—CONTEST—RELINQUISHMENT.

STRADER *v.* GOODHUE.

The preferred right of entry accorded a contestant is not a vested right until he has "contested, paid the land office fees, and procured the cancellation" of the entry attacked.

An entryman may relinquish at pleasure any legal subdivision of his entry, if no transfer thereof has been made, and such relinquishment will take effect immediately upon its filing.

In case of a contest against a timber-culture entry on the ground of failure to plant the acreage required by law, the entryman may, prior to the trial, relinquish part of his entry and retain the remainder, if his compliance with law is such as to entitle him to patent for the unrelinquished tract.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *November 25, 1901.* (J. R. W.)

May 6, 1901, departmental decision (unreported) affirmed your office decision of November 24, 1900, holding for cancellation the timber-culture entry of Justin A. Goodhue, for the SE. $\frac{1}{4}$, Sec. 14, T. 5 N., R. 5 W., M. M., Boise, Idaho, in the contest of Jerome B. Strader against said entry.

Goodhue filed a motion for review of said departmental decision, which was entertained by the Department, August 13, 1901, and directed to be served. Service has been made, response filed, and the motion, arguments, and original record are before the Department for decision upon the merits.

No material disputed question of fact exists in the case. Goodhue made timber-culture entry December 17, 1887. December 23, 1898, Strader filed a contest affidavit against the entry, charging that Goodhue has not planted to trees *ten* acres of the land, as required by law, or at all. April 25, 1899, there was a hearing at the local office, at which contestant appeared in person and with counsel, and defendant by counsel. Before the trial defendant's counsel filed a relinquishment for the south half of the tract, and demanded immediate cancellation of the entry as to that tract, which the local office at contestant's objection refused. Contestant amended his complaint to charge that about five acres of natural timber were growing on the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section 14 at the time of said entry. Trial was had June 5, 1899. February 2, 1900, the local office found in favor of contestant and recommended cancellation of the entry.

The evidence shows that there was not such a natural growth of trees upon this section as to exclude it from timber-culture entry; that defendant had planted and cultivated but about five acres of trees, and by irrigation had on that tract secured a vigorous growth of timber, stated to number some 15,000; thirteen acres additional were broken, reclaimed, and cultivated to alfalfa. These results were secured by an

expenditure of about \$2,000, and defendant claimed that his deficiency in area of land successfully cultivated to timber was due to a mistake and erroneous information that the number of healthy living trees would be taken into consideration, and excuse literal compliance with the requirement of area. Your office decision held:

The right of the contestant is determined by the status of the land and entry when contest is instituted, and his right to proceed against the entry cannot be defeated by a subsequent relinquishment (9 L. D., 440, 461; 29 L. D., 471 [171?]). It is further held that a timber culture entryman cannot, where contest is brought against his entry, avail himself of a partial compliance with the law to retain a proportionate part of the land entered (13 L. D., 459).

It is clearly established—in fact is not denied—that the defendant has not complied with the law in the matter of the area of trees planted. At best he can be said to have planted but five acres in the manner in which the law required ten acres to be planted. Whatever other expenditure he may have made upon the tract, he was clearly in default in that material particular, a default so serious as to be fatal.

There is thus presented a record in which, had the entry originally made been for the north half only of the quarter section, it would have shown so full and unquestioned compliance with the law as to be not only beyond attack, but to merit special commendation.

It is not the opinion of the Department, on reconsideration of the case, that any rule of law or of former decisions requires so severe a decision of the present case as that under review.

The preference right is not a right vested until a contestant has “contested, paid the land office fees, and procured the cancellation” of the entry attacked. This is the plain wording of the acts of May 14, 1880 (21 Stat., 140), and July 26, 1892 (27 Stat., 270). The contestant’s preference right is in the nature of a reward offered to an informer. The general rule as to the vesting of right under such statutes accords with the plain wording of this statute—viz: that the right does not become vested until judgment, and may be cut off (1) by a repeal of the statute (*United States v. Connor*, 138 U. S., 61); (2) by a pardon (*United States v. Harris*, 1 Abbott, U. S., 110; *United States v. Lancaster*, 4 Wash., U. S., 64; *Brown v. United States*, 1 Wool., U. S., 198); or by remission of the penalty by competent authority pending the proceedings (*United States v. Morris*, 10 Wheat., 246). So in many decisions of the Department it is held that a contestant gets no preference right unless the relinquishment is the result of the contest.

An entryman may relinquish at pleasure to the government any governmental subdivision of his entry, if no transfer has been made. (*Smith v. Crawford*, 4 L. D., 449; *Joseph Hurd*, 2 L. D., 317; *Alfred Anscomb*, 26 L. D., 337, 339; *Walters v. Northern Pacific R. R. Co.*, 23 L. D., 492, 494.) A relinquishment takes effect at once upon its filing. The local office, therefore, erred in not accepting and noting the relinquishment offered.

Had they done so, the contestant's preference right would have at once attached. He could then have determined whether he would prosecute the contest as to the remainder of the entry.

A review of published departmental decisions fails to disclose any decision that a relinquishment of part of an entry may not be made before trial of a pending contest. *Webb v. Loughrey et al.*, 9 L. D., 440; *Brakken v. Dunn et al.*, 9 L. D., 461, and *Hornsby v. Carson et al.*, 29 L. D., 171, were cases wherein relinquishments were made of the entire tract pending contest, thereby taking the entryman out of the case as no longer a party in interest, and a third party claimed right to make entry. The question determined in those cases was, whether the contestant could be defeated of his preference right. The cases properly decided that the contestant may prove his charge and establish his preference right. To hold that a relinquishment filed pending contest defeated the preference right would practically nullify the statute by giving the entryman in every contest power to do so. *Abbott v. Willard*, 13 L. D., 459, was where a relinquishment of part of an entry to save the remainder intact was first applied for, after trial in the local office, on the appeal to your office. It was an attempt to change the issue after the trial was had. The issue tried, the costs of which the contestant had borne, was as to the validity of the entire entry. The contestant at his own expense contested and had procured a cancellation of the entry as far as the trial court could go. The subsequent proceedings were appellate only, and the contestant ought not to be defeated by defendant's election to relinquish part of the land during the appellate proceedings. He is entitled to a judgment upon the issues and proceedings had. The case was, therefore, correctly decided.

The present case is clearly distinguishable from any of the foregoing. The relinquishment was filed before trial. The contestant, before any costs accrued, got half the land. He had no vested right by the mere filing of complaint, before judgment, to take from defendant \$2,000 of improvements, which standing on half of the land he could not assail, and which the entryman seeks to save by relinquishment of half the ground.

Under the supervisory power of the Secretary of the Interior, as head of the land department, he has all the powers for protection of equities arising from fraud, accident, mistake, *part performance*, or other head of equitable jurisdiction, that a court of chancery would have. This doctrine is clearly announced in *Williams v. United States* (138 U. S., 514, 524), and where, as in this case, an entryman has obviously strong equities, and presents and claims them before putting the contestant to the costs of a trial, by filing a relinquishment, so as to conform his entry to what he can properly claim under the law, then, independently of any question of strictly *legal right* of an

entryman to make such relinquishment, it ought in equity and good conscience be allowed him.

No *mala fides* existed in the inception, or yet in the prosecution of the entry after it was made. The performance was such as entitled the entryman to hold half the land; he might originally have made his entry for that quantity, and before trial or incurrence of costs by the contestant he offered to relinquish so much as was in excess of what he could rightly hold. He, therefore, may be, and should be, allowed to relinquish the excess of his entry and save thereby the improvements and expenditures he has in good faith made.

The departmental decision of May 6, 1901, is therefore recalled and vacated, your office decision and the finding and recommendation of the local office are reversed, the relinquishment for the south half of said entry will be noted, and the remainder of said entry held intact.

MINING CLAIM—APPLICATION FOR PATENT—CONFLICT.

THE WANDA GOLD MINING CO. *v.* THE E. F. C. MINING AND
MILLING CO.

An application for mineral patent which includes ground embraced in a prior or pending application for patent should not be received as to the ground in conflict; but where such an application has been received, and proceedings had thereon, and an adverse claim has been filed and suit brought upon it in a court of competent jurisdiction, the application will not be rejected and the parties required to begin proceedings anew, but the adverse suit will be recognized as a stay of proceedings on the application for patent until the suit shall have been finally determined, after which the application will be adjudicated in accordance with that determination.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) November 26, 1901. (A. B. P.)

September 25, 1900, the application, No. 2237, for patent to the Black Crow lode mining claim, survey No. 11,530, Pueblo, Colorado, land district, was declared finally rejected and canceled of record in your office, pursuant to departmental decision of August 7, 1901 (not reported), in the case of *J. J. Miller et al. v. Thomas Gardner et al.* The reason for such rejection was, that the applicants, *Gardner et al.*, had not expended, within the time provided by the statute (Sec. 2325, R. S.), \$500 in labor or improvements for the development of the claim.

Notice by your office of the final action in that case did not reach the local office until September 28, 1900. In the meantime, September 21, 1900, The E. F. C. Mining and Milling Company (hereinafter called The E. F. C. company) presented at the local office an application for patent to the Rittenhouse, E. F. C., Alva, and W. E. S. lode mining

claims, survey No. 10,456, each of which claims as applied for, except the W. E. S., embraced ground included in said application, No. 2237, for the Black Crow claim; and September 26, 1900, the Wanda Gold Mining Company (hereinafter called the Wanda company), theretofore one of the co-applicants with said Gardner but now claiming to be sole owner of the Black Crow location, presented a new application for patent to that claim, embracing substantially the same ground included in application No. 2237. Notwithstanding the local office was yet without advice of final action in the matter of said application, No. 2237, for the Black Crow claim, and that such application was therefore still a matter of record in that office, the said applications of September 21 and 26, 1900, were received by the local office on those dates, respectively.

The local office subsequently decided that as the application of The E. F. C. company was first received it was entitled to precedence, and the same was accordingly formally placed of record October 17, 1900. Notice thereof by publication and posting was begun October 20, 1900. On the former of these dates the notice previously submitted by the Wanda company with its application was returned by the local office, and the company was required to exclude from its application for patent the ground in conflict between the Black Crow and the Rittenhouse, E. F. C., and Alva claims. From the action of the local office adverse to the new application for patent to the Black Crow claim the Wanda company appealed, and also in accordance with the suggestion of the local office, filed an adverse claim against The E. F. C. company's application as to the Rittenhouse, E. F. C., and Alva claims. Suit was commenced on the adverse to determine the right of possession to the ground in controversy. The suit is apparently still pending.

February 11, 1901, your office, upon consideration of the appeal of the Wanda company, held that neither company's application for patent could be recognized as valid for any part of the ground formerly included in the application, No. 2237, of Gardner *et al.* The E. F. C. company's application was accordingly held for rejection as to all the ground in controversy and the application of the Wanda company was held for rejection *in toto*. From that decision the Wanda company appealed. The E. F. C. company subsequently filed a motion for review, but the same was not considered by your office, because of the appeal previously taken by the Wanda company. Under the circumstances, the motion for review will be here considered as an appeal by The E. F. C. company.

The receipt of the applications of The E. F. C. and Wanda companies, September 21 and 26, 1900, respectively, and the subsequent action of the local officers, whereby all the rights of precedence were accorded to the former and the burdens of subordination to the latter,

amounted to entertaining and giving full recognition to new or junior applications for patent when the land was, at the time of their presentation, embraced in an existing application which was still intact upon the records of the local office.

That action was clearly contrary to the spirit and intent, if not the letter, of the Mining Regulations in force at the time (Par. 49, 25 L. D., 577, and 28 L. D., 602; Aspen Mountain Tunnel Lode No. 1, 26 L. D., 81) and still in force (Par. 44 of Regulations approved July 26, 1901, 31 L. D.,), wherein it is declared:

Before receiving and filing a mineral application for patent, local officers will be particular to see that it includes no land which is embraced in a prior or pending application for patent or entry, or for any lands embraced in a railroad selection, or for which publication is pending or has been made by any other claimants, and if, in their opinion, after investigation, it should appear that a mineral application should not, for these or other reasons, be accepted and filed, they should formally reject the same, giving the reasons therefor, and allow the applicant thirty days for appeal to this office under the Rules of Practice.

The applications in question, when offered for filing, should not have been received by the local officers for any ground embraced in the prior application No. 2237, then still intact upon their records, but should have been promptly rejected as to such ground. The chief purpose and object of the regulations on the subject are to secure the orderly disposal of applications for patent to mining claims and thereby to prevent unnecessary complications. A careful observance of the regulations by the local officers should be insisted upon.

It is not believed that the best results would be accomplished in this case, however, by now rejecting The E. F. C. company's application for patent and requiring the parties to retrace their steps and begin proceedings anew. Though the application was, to the extent stated, irregularly received at the time it was offered, proceedings have been had upon it by the publication and posting of notice, an adverse claim has been filed by the Wanda company wherein possessory title to the ground with respect to which the irregularity arose is asserted, and suit on the adverse has been brought and is now pending in the courts. No reason is apparent why the rights of the conflicting or adverse claimants to the ground in controversy may not be fully determined in that suit, and, it is believed, with as nearly an equal opportunity to each of the contending parties as would be secured if new patent proceedings were required and a new suit thus made necessary.

The decision appealed from is accordingly reversed, with direction that the Wanda company's adverse suit be recognized as a stay of proceedings in the case until said suit shall have been finally determined. The E. F. C. application will then be adjudicated in accordance with that determination.

The Wanda company's application will stand rejected unless the

company should exclude therefrom all conflict with the Rittenhouse, E. F. C., and Alva claims, in which event, if no other objection shall appear, the application may be accepted and proceedings had thereon as in other cases.

APPLICATION TO PURCHASE—NON-MINERAL AND NON-PROSECUTION
AFFIDAVIT—SECTION 2, ACT OF JUNE 15, 1880.

SIERRA LUMBER CO.

An application to purchase under section 2 of the act of June 15, 1880, will not be allowed in the absence of an affidavit showing the non-mineral character of the land applied for and that no prosecution or proceeding has been had against the applicant on account of any trespass committed or material taken from any of the public lands subsequent to March 1, 1879.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *November 26, 1901.* (J. R. W.)

The Sierra Lumber Company appealed from your office decision of April 20, 1901, requiring additional proof upon its application, as transferee of Harriett J. Shipley, to purchase, under section 2 of the act of June 15, 1880 (21 Stat., 237), the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 25, T. 28 N., R. 4 E., M. D. M., Redding, California.

October 18, 1875, Harriett J. Shipley, as widow of John H. Shipley, made entry for the tract as additional to her original entry for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 32, T. 22, R. 29, made at Springfield, Missouri, October 29, 1874, which additional entry was canceled, June 20, 1877, for the reason that the alleged military service of John H. Shipley, in Co. C, 15th Mo. Cav. Vol., could not be verified. In the meantime, November 24, 1875, Mrs. Shipley, by deed in due form, conveyed said land to Alvinza Hayward, who by deed, September 20, 1877, conveyed for value to the applicant. June 2, 1900, the Sierra Lumber Company applied to enter the land. Your office decision required of the applicant—

an affidavit showing the non-mineral character of the land applied for, and that no prosecution or proceeding has been had against said transferee, its employees, or agents, on account of any trespass committed or materials taken from any of the public lands subsequent to March 1, 1879.

It is assigned for error that a non-mineral affidavit was in fact filed with the application; that no non-mineral affidavit is necessary; and that no non-prosecution affidavit is requisite because the fourth section of the act applies only to the first section and not to entries under the second section.

The claim that a non-mineral affidavit was in fact filed seems to be without foundation in fact. No such affidavit appears in the files, except that made October, 1875.

That the fourth section of the act applies to the entire act is the express declaration of the act itself. Mineral lands are expressly excepted from its operation, and being excepted a non-mineral affidavit is required as in cases of other entries limited to non-mineral lands. The fourth section contains two distinct clauses. The first relates to the character of the land applied for, and excepts mineral land from its operation; the second clause relates to persons, and provides that:

No person who shall be prosecuted for or proceeded against on account of any trespass committed or material taken from any of the public lands, after March first, eighteen hundred and seventy-nine, shall be entitled to the benefit thereof.

So far as any provisions of the act relate to persons this provision must be held to be as applicable as is the first clause to the character of the land. The second clause can not be limited in operation to the first section without also so limiting the first clause. Such limited operation might have been given by making the fourth section a proviso upon the first, and changing the word act to section. But as Congress expressly says that "this act" shall not apply to mineral lands, nor shall certain persons have the benefit "thereof,"—"thereof" referring to the act—no other construction of this provision is possible than that given by your office—

that Congress, while granting immunity for this class of violations of the land laws committed prior to March 1, 1879, intended to deprive such persons as should in the future persist in violating the law from deriving the benefit of the act.

Your office decision is affirmed.

OKLAHOMA LAND—TOWNSITE—APPLICATION TO COMMUTE.

ARTHUR Y. BOSWELL.

The general provisions of the town-site laws control in the allowance of town-site entries upon the lands ceded by the Kiowa, Comanche and Apache Indians; and the special provision, authorizing the commutation of homestead entries for town-site purposes, contained in the second proviso of section 22 of the act of May 2, 1890, is not applicable to entries made upon said lands.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *November 26, 1901.* (J. H. F.)

The Department is in receipt of your office letter of November 12, 1901, transmitting for its consideration a petition, and accompanying plat, filed by Arthur Y. Boswell, wherein he prays that he may be allowed to commute, for townsite purposes, part of his homestead entry, No. 1880, made August 24, 1901, for the NE. $\frac{1}{4}$, Sec. 31, T. 1 N., R. 17 W., I. M., in the Lawton land district, Oklahoma.

Boswell's petition and the accompanying plat were originally filed

in the Department September 4, 1901, and were referred to your office for appropriate action. By your office letter aforesaid the papers were returned with your report thereon to the effect that the petition and plat filed by Boswell do not in any particular conform to the requirements of General Land Office Circular (page 54), approved July 11, 1899, relating to the commutation of homestead entries for townsite purposes, but you further state the petition presents the question as to whether any portion of Boswell's entry can be commuted for townsite purposes under the second proviso contained in section 22 of the act of May 2, 1890 (26 Stat., 81), and you accordingly ask for such instructions in the premises as the Department might deem advisable.

The provision authorizing homestead entrymen to commute their homestead entries, for townsite purposes, contained in the second proviso of section 22 of the act of May 2, 1890, as distinguished from the general provisions of the townsite laws, is special in character and is as follows:

■ That in case any lands in said Territory of Oklahoma which may be occupied and filed upon as a homestead, under the provisions of law applicable to said Territory, by a person who is entitled to perfect his title thereto under such laws, are required for townsite purposes, it shall be lawful for such person to apply to the Secretary of the Interior to purchase the lands embraced in said homestead or any part thereof for townsite purposes. He shall file with the application a plat of such proposed townsite, and if such plat shall be approved by the Secretary of the Interior, he shall issue a patent to such person for land embraced in said townsite, upon the payment of the sum of ten dollars per acre for all the land embraced in such townsite, except the lands to be donated and maintained for public purposes as provided in this section.

The land embraced in Boswell's entry is part of what was formerly known as the Kiowa, Comanche and Apache reservation opened to settlement and entry August 6, 1901, in pursuance of the President's proclamation issued July 4, 1901. The act of June 6, 1900 (31 Stat., 672, 676), ratifying the agreement with said Indian tribes, being the act under which the lands in question were opened to settlement and entry, and the President's proclamation aforesaid, both expressly provide that said lands should be disposed of "under the *general* provisions of the homestead and townsite laws of the United States."

The act of May 2, 1890, *supra*, also contains a further special provision to the effect that "all persons who shall settle on land in said Territory under the provisions of the homestead laws of the United States and of this act shall be required to select the same in square form as nearly as may be." In the recent case of *Calvert v. Wood* (31 L. D., 83), the Department was called upon to determine whether this special provision was applicable to entries made on the Kiowa, Comanche and Apache lands, under the provisions of the act of June 6, 1900, above quoted, and it was therein held that the general provi-

sions of the homestead law, as found in section 2289 of the Revised Statutes, as amended by act of March 3, 1891 (26 Stat., 1095), would control as to the form of entries made on these lands. The "general provisions" of the townsite laws of the United States referred to in the act of June 6, 1900, *supra*, are found in sections 2380 to 2389, inclusive, of the Revised Statutes, and in view of the ruling announced in the case cited it is evident that these general provisions must govern the allowance of townsite entries upon the Kiowa, Comanche and Apache lands, and that the special provision, authorizing the commutation of homestead entries for townsite purposes, contained in the second proviso of section 22 of the act of May 2, 1890, is not applicable to entries made on the lands in question. Conceding that the special provision contained in the act of 1890, *supra*, is broad enough in terms, in the absence of other legislation affecting its operation, to embrace lands in the Oklahoma Territory acquired from the Indians subsequently to the passage of that act, the Department is of opinion that the language, hereinbefore quoted, employed in the act of June 6, 1900, operated to exclude the lands thereby authorized to be opened to settlement and entry from any effect which such special provision might otherwise have had relative thereto.

The fact that it was expressly provided in the act of 1900, *supra*, that the lands therein designated should be disposed of under the "general provisions" of the homestead and townsite laws of the United States evidenced a then present intention on the part of Congress to thereby render inapplicable to said lands the special provision contained in the act of 1890 to which reference has been made.

Boswell's petition is, accordingly, denied and the accompanying plat filed therewith is rejected.

ARNOLD WINK.

Motion for review of departmental decision of August 29, 1901, 31 L. D., 47, denied by Secretary Hitchcock November 26, 1901.

INDIAN LANDS—ALLOTMENTS—ACT OF JUNE 6, 1900.

OPINION.

Under article three of the agreement with the Shoshone and Bannack Indians, and the act of June 6, 1900, ratifying and confirming said agreement, each member of a family of said Indians occupying and cultivating, under the sixth section of the treaty of July 3, 1868, any portion of the lands ceded by said act of June 6, 1900, is entitled to an allotment thereunder, restricted to the lands occupied at the date of agreement, not exceeding 320 acres for any one family.

Assistant Attorney General Van Devanter to the Secretary of the Interior, December 4, 1901. (W. C. P.)

With his letter of October 3, 1901, the Commissioner of Indian Affairs submitted for your approval a schedule of allotments to Indians upon the ceded lands of the Fort Hall Indian reservation in Idaho, and you have referred the matter to me for an opinion as to whether said allotments are in conformity with the provisions of the act of June 6, 1900 (31 Stat., 672).

By the treaty of July 3, 1868, proclaimed February 24, 1869 (15 Stat., 673), with the Shoshone and Bannack tribes of Indians a reservation described by metes and bounds was set apart for them and by Article VI it was provided as follows:

If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within the reservation of his tribe, not exceeding three hundred and twenty acres in extent, which tract so selected, certified, and recorded in the "land book," as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above described. For each tract of land so selected a certificate, containing a description thereof, and the name of the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office subject to inspection, which said book shall be known as the "Shoshonee (eastern band) and Bannack Land Book."

The President may at any time order a survey of these reservations, and when so surveyed Congress shall provide for protecting the rights of the Indian settlers in these improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations, and the internal police thereof, as may be thought proper.

By an agreement ratified and confirmed by act of Congress approved June 6, 1900, *supra*, the Indians ceded to the United States a portion of their reservation described by metes and bounds for which they were to be paid \$600,000. Article III of that agreement reads as follows:

Where any Indians have taken lands and made homes on the reservation and are now occupying and cultivating the same, under the sixth section of the Fort Bridger treaty hereinbefore referred to, they shall not be removed therefrom without their consent, and they may receive allotments on the land they now occupy; but in case they prefer to remove they may select land elsewhere on that portion of said reservation not hereby ceded, granted, and relinquished and not occupied by any other Indians; and should they decide not to move their improvements, then the same shall be

appraised under direction of the Secretary of the Interior and sold for their benefit, at a sum not less than such appraisal, and the cash proceeds of such sale shall be paid to the Indian or Indians whose improvements shall be so sold.

The ratifying act contains the following provision:

That before any of the lands by this agreement ceded are opened to settlement or entry, the Commissioner of Indian Affairs shall cause allotments to be made of such of said lands as are occupied and cultivated by any Indians, as set forth in article three of said agreement, who may desire to have the same allotted to them; and in cases where such Indian occupants prefer to remove to lands within the limits of the reduced reservation, he shall cause to be prepared a schedule of the lands to be abandoned, with a description of the improvements thereon, and the name of the Indian occupant, a duplicate of which shall be filed with the Commissioner of the General Land Office.

It seems from the protests filed and the report of the Commissioner of Indian Affairs, that the allotments made within the lines of the ceded tract have not been restricted to lands occupied and cultivated by Indians. On the other hand, where an Indian was occupying and cultivating land, an allotment of eighty acres, as provided in the "general allotment act," has been awarded to him, and each member of his family has also been given a like allotment, sometimes adjoining or in the immediate vicinity of the tract selected by and for the head of the family, and sometimes several miles distant therefrom.

The treaty, it will be noted, provides that the land taken under it "may be held in the exclusive possession of the person selecting it and of his family," and the evident purpose of the agreement was to protect the persons within the purview of that provision in their possession by allowing them to take allotments of such lands. To effectuate this purpose, all members of a family so occupying a portion of these lands should be given allotments, with the proviso that such allotments be restricted to the lands occupied, not exceeding three hundred and twenty acres for any one family.

There is nothing in either the agreement or the ratifying act to warrant the conclusion that it was intended to appropriate to the purpose of the allotments provided for any land not occupied at the date of the agreement. The provision providing for these allotments, which is a concession or gift to the Indians, specifically describes the lands from which the allotments may be made as those which they (the Indians) "now occupy." If it had been intended to allow lands not occupied to be taken in sufficient quantity to provide each member of the family of one coming within the terms of said provision, without regard to the fact of occupancy, words denoting that intention would have been inserted. The provision of the ratifying act respecting those allotments restricts them to lands occupied and cultivated by Indians, and it contains nothing to indicate an intention to enlarge the provision of the agreement.

To the extent that the allotments in the schedule submitted were

made upon a theory different from the views herein expressed, they were, in my opinion, not made in accordance with the provisions of law.

Approved, December 4, 1901:

E. A. HITCHCOCK, *Secretary*.

DESERT LAND—ACT OF AUGUST 18, 1894.

INSTRUCTIONS.

A sparse and stunted growth of trees which may exist with little moisture and is frequently found upon arid lands actually unfit without irrigation for ordinary agricultural purposes, should not be held as necessarily indicative of the non-desert character of the land, and hence excluding it from selection under the act of August 18, 1894.

Secretary Hitchcock to the Commissioner of the General Land Office
(W. V. D.) *December 5, 1901.* (E. F. B.)

The Department is in receipt of your report of October 1, 1901, upon a letter from the State land agent of the State of Oregon, asking whether certain lands described therein would be considered desert lands within the meaning of the fourth section of the act of August 18, 1894 (28 Stat., 372, 422), providing for the donation to certain States of desert lands found therein.

It is stated in said letter that the State desires to segregate for irrigation and reclamation under said act a body of lands the character of which is described as follows:

It is entirely destitute of water and is strictly a desert, but on certain portions of it there is a scattering growth of Junipers. The Juniper, and especially the scrubby variety growing on this desert, is not suitable for lumber, can be used only for wood and fence posts, and there is no more of such wood on any quarter-section than will be necessary for the use of the settler on that quarter-section; it can not be made into lumber and shipped away, and can be used only in the immediate vicinity of its growth.

Referring to the regulations of the Department controlling the selection of desert lands under said act, which provide that lands containing sufficient moisture to produce a natural growth of trees are not to be classed as desert lands, you express the opinion that said rule should be liberally construed, for the reason that the land is doubtless unfit for cultivation without irrigation, or else it would have been entered long ago. To that end you recommend that said regulations should be amended by the following addition:

Provided, That a sparse and stunted growth of trees having no merchantable value, shall not cause the land on which they grow to be classed as non-desert.

The lands subject to selection under the act of August 18, 1894, are desert lands as defined by the act of March 3, 1877 (19 Stat., 377).

Hence the rules prescribed by the Department for determining the character of lands subject to entry under the desert-land law must control in determining the character of lands subject to selection under the act of August 18, 1894, and those rules are incorporated in the regulations for carrying into effect the last-mentioned act.

The rule referred to in your report is based upon the theory that lands containing sufficient moisture to produce a natural growth of trees would, in ordinary seasons, contain sufficient moisture to produce agricultural crops. In the letter of the Department of May 11, 1888 (6 L.D., 662, 665), holding that a growth of Mesquite trees on the land will not exclude it from entry under the desert-land law, if it will not produce an agricultural crop without irrigation, it was said that the existence of ordinary timber trees on the land "is evidence of the fact that the land is not desert. If the ordinary forest trees will grow upon land there is sufficient moisture in the soil to render the land non-desert in character."

The purpose of the act of March 3, 1877, was to bring within its operation all lands in the designated States and Territories that could not be successfully cultivated and made profitable for agriculture without irrigation. The third section of the act declares that the determination of what may be considered desert-land shall be subject to the decision and regulation of the Commissioner of the General Land Office. While rules have been adopted to aid in determining whether lands are desert or non-desert in character, such rules should not arbitrarily control your judgment where it clearly appears that lands are actually desert and of the character contemplated by the act, although they may not come within the strict letter of the rule.

A growth of ordinary forest trees on land in the arid region may, as a general rule, be accepted as evidence of the non-desert character of the land. It is, however, a mere presumption that lands containing sufficient moisture to produce trees will produce agricultural crops, but, like all presumptions of fact, it may be rebutted by proof showing that the land is actually desert in character and will not produce agricultural crops without irrigation.

There appears to be no necessity for an amendment to the rule referred to. It should be construed by you with a view to attain the true intent and meaning of the act in accordance with the views above set forth.

A sparse and stunted growth of trees which may exist with little moisture and is frequently found upon arid lands actually unfit without irrigation for ordinary agricultural purposes, is not within the spirit and intent of the rule.

There being no application before the Department for its approval as to any particular tract or tracts, no decision is hereby made with reference to the tracts referred to by the State agent. His letter is

returned to your office to be placed with the files thereof, and you will advise him with reference thereto in the light of the instructions herein given.

RAILROAD GRANT—ACT OF JULY 2, 1864—JOINT RESOLUTION OF MAY
31, 1870.

NORTHERN PACIFIC RY. CO. v. SMITH ET AL.

Lands within the overlap of the grant made by the act of July 2, 1864, to the Northern Pacific Railroad Company, and the grant made to the same company by the joint resolution of May 31, 1870, are subject to indemnity selection by said company under the latter grant.

Spaulding v. Northern Pacific R. R. Co., 21 L. D., 57, overruled.

Selections of lands under the act of June 4, 1897, while of record and awaiting consideration, bar indemnity selection of the same lands under a railroad grant.

In determining priorities of claims in a controversy arising upon the filing by a railroad company of a list of selections, regular in form, upon the day the plat of survey of the township in which the selected lands are situated was officially filed, and the presentation, on the same day, of homestead applications for said lands, the actual time of the presentation of the claims will be recognized.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *December 5, 1901.* (F. W. C.)

The Northern Pacific Railway Company, successor in interest to the Northern Pacific Railroad Company, has appealed from your office decision of July 16, last, in the matter of its attempted selection of certain lands in the Vancouver land district, Washington, included in indemnity list No. 105.

The tracts described in said list are in townships 4 and 5 north, range 5 east, and are within the indemnity limits of the grant made by the joint resolution of May 31, 1870 (16 Stat., 378), in aid of the construction of that portion of said road extending from Portland, Oregon, northward to Tacoma in the State of Washington. They are also within the limits of the grant made by the act of July 2, 1864 (13 Stat., 365), in aid of the construction of that portion of the main line of the Northern Pacific railroad *via* the valley of the Columbia river to Portland. This portion of the main line was never constructed and the grant appertaining thereto was forfeited by the act of September 29, 1890 (26 Stat., 496). The plats of survey of said townships were declared officially filed at 9 a. m. on May 21, 1900, and on that day the Northern Pacific Railway Company filed its indemnity list No. 105, in which it selected these lands in lieu of others lost within the place limits of its grant. The local officers rejected said list because the lands were a part of those forfeited by the act of September 29, 1890. From this action the railway company duly appealed.

The action of the local officers was evidently based upon departmental decision in the case of *Spaulding v. Northern Pacific R. R. Co.* (21 L. D., 57).

Under date of September 20, last, the Attorney-General enclosed a copy of the decision of the circuit court of the United States in the district of Washington, western division, in the suit brought by the United States against the Northern Pacific Railroad Company to have judicially determined the question as to the rights of said company within the overlap of the grants before described, which decision was in favor of the Northern Pacific Railroad Company, and was based upon the decision of the supreme court in the case of the United States *v. the Oregon and California Railroad Company* (176 U. S., 28). The circuit court's decision appearing to be fully justified by the supreme court decision referred to, no appeal was taken from the former. In so far, therefore, as the rejection of said list was based upon the fact that the lands were within the limits of the main line grant, the same must be set aside.

From the statement contained in your office decision of July 16, last, it appears, however, that prior to the filing of said railroad indemnity list No. 105, a large portion of the lands included in said list had been selected under the act of June 4, 1897 (30 Stat., 11, 36). A list of these lands, the names of the claimants, and the dates of selection are given in said decision.

It further appears that on the same day that said indemnity list was filed, but subsequently to the filing of said list, a number of persons were permitted by the local officers to make homestead entries for portions of the land included in said indemnity list. Each of the entrymen, however, alleged settlement upon the land prior to the date of his application. On the day following the filing of said railroad indemnity list numerous other persons were permitted to make homestead entries of portions of the land included in said list. These persons, also, alleged settlement prior to the time of the filing of the railroad indemnity list. A full description of the lands entered, including the names of the entrymen and the numbers of the homestead entries, together with the dates of the allowance thereof are set forth in your said office decision.

Said decision sustains the rejection of the railroad indemnity list as to the lands selected under the act of June 4, 1897; also as to the lands entered on the day of the filing of said list, and cites as authority for giving precedence to such entries the following cases: *St. P., M. & M. Ry. Co. v. Gjuve* (1 L. D., 331); *N. P. R. R. Co. v. Parker & Hopkins* (2 L. D., 569); *Mattson v. St. P., M. & M. Ry. Co.* (5 L. D., 356). With regard to the entries allowed on the day following the filing of the railroad indemnity list, said decision makes provision for hearings, based upon the allegation of settlement made by the entrymen, in all

cases except that of Jackson E. Montz, in which it is held that a hearing is unnecessary because Montz was permitted by the local officers to make final proof upon his entry on which final certificate issued September 10, 1900, which proof was made after due publication of notice and shows continuous residence upon the land from April 30, 1894, to the date of the offer of proof.

In its appeal the railway company urges error in your office decision in holding that the selections under the act of June 4, 1897, were sufficient to bar the railroad indemnity selection without first considering and determining the validity thereof. In the opinion of this Department the contention of the company in this respect can not be sustained. The validity of the selections under the act of June 4, 1897, is not questioned by the railway company and said selections, while of record and awaiting consideration, were sufficient to bar the selection of the same lands under the railroad grant.

With regard to the entries allowed upon the day of the tender of the railroad indemnity list, the appeal by the railway company urges that the cases relied upon in your said office decision do not support the action taken; that due notice of the filing of the township plats was given, and under departmental ruling they were considered as officially filed at 9 a. m. on May 21, 1900, at which time the lands embraced therein became subject to entry by any qualified applicant or to selection on account of the railroad grant, being within the indemnity limits thereof; and that in determining priorities the actual time of presentation of the claim should be recognized and the rights of the company should not be suspended for a day, as would be the claimed result of your said office decision.

From a careful consideration of the matter, it is the opinion of this Department that the contention of the company should be upheld. The cases relied upon in your said office decision involve lands withdrawn by operation of law upon the filing in the Department at Washington of maps of location, notice of which must be communicated to the local officers at a later date. These cases merely give recognition to claims initiated by settlement on the land or the filing of a claim in the local office upon the day the rights under the grant attached by the filing of the maps before referred to.

It must be held that if selection list No. 105 was regular in form, the same should have been accepted upon its filing as to the lands subsequently included in these entries, but as each of the homestead applicants alleged settlement prior to the tender of the railroad indemnity list, it will be necessary that a hearing be ordered, after due notice to the company, to determine the truth of said allegations.

With regard to the entries allowed on the day following the filing of the railroad indemnity list, the appeal by the railway company seems to take no exception to the action taken by your office decision in

ordering hearings except as to the case of Montz. The Department believes the action of your office should also have been extended to the case of Montz, as the railway company, which was then asserting a claim to the land as shown by the local office records, was not specifically cited to appear at the time of his offer of final proof, and therefore is not concluded by the proof so made. In this respect the decision of your office is disapproved.

Except as herein modified, your office decision is affirmed.

INDIAN LAND—MINING CLAIM WITHIN TOWNSITE—ACT OF JUNE 6, 1900.

INSTRUCTIONS.

The provision of the act of June 6, 1900, whereby the mining laws were extended over the lands ceded to the United States by the Comanche, Kiowa and Apache tribes of Indians in the Territory of Oklahoma, was not intended to operate as an exception to the settled principles applied by the land department in the administration of the public land laws generally. Controversies between mineral and agricultural or townsite claimants, as to any of said ceded lands, are to be determined upon the same principles which apply to like controversies with respect to the public lands situated elsewhere.

Lands not known to contain valuable mineral deposits at the time when, in the absence of such knowledge, the rights of an Indian allottee, or of a homestead or townsite entryman, become fixed and vested, are not thereafter subject to exploration, location or entry by other parties under the mining laws.

Rights once vested in an allottee, or in an entryman under the homestead or townsite laws, or in a town-lot purchaser, can not be affected by the subsequent exploration or location of the lands for minerals.

No mining location of land within the county-seat town-sites of Lawton, Anadarko, or Hobart, made after the special reservation of those town-sites on June 24, 1901, under the act of March 3, 1901, is of any validity or effect whatever.

Congress having made no provision for a United States surveyor-general for the Territory of Oklahoma, and not having authorized the duties required to be performed by a United States surveyor or surveyor-general in the administration of the mining laws generally, to be performed in said Territory by any other officer, it is the duty of the Commissioner of the General Land Office, in administering the mining laws as extended over the aforesaid ceded lands by the act of June 6, 1900, to perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying of mining claims located upon said lands, with the view of obtaining patents for such claims, and all similar duties in any manner respecting the conduct of proceedings to obtain such patents, and to enforce and carry into execution any and every part of the provisions of the mining laws with respect to said ceded lands, not otherwise specially provided for in the act extending said laws over said lands.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *December 6, 1901.* (A. B. P.)

The Department is in receipt of your communications of November 15 and 22, 1901, relating to the provision of the act of June 6, 1900 (31 Stat., 672, 680), whereby the mining laws were extended over the

lands ceded to the United States by the Comanche, Kiowa, and Apache tribes of Indians in the Territory of Oklahoma.

With the communication of November 15 a proposed letter of instructions to the local officers having jurisdiction in the premises, on the subject of receiving applications for patent to mining claims, is submitted for the consideration of the Department.

The communication of November 22 is accompanied by a letter of November 16, 1901, addressed to your office by the register of the local office at Lawton, Oklahoma, wherein it is stated, in substance, that numerous notices of mineral locations have been filed with the Register of Deeds of Comanche county, Oklahoma, covering lands within the limits of the city of Lawton, which have been purchased from the government by lot owners in said city; that the entire city is practically covered by such mineral locations, and clouds upon the titles of lot owners have thus been created, which have become a source of great annoyance, and are calculated to injuriously affect the business interests of the city.

The register asks that he be advised as to what effect, if any, the mineral claims thus asserted have or may have upon the property rights of lot owners in said city.

You state that numerous letters are being received by your office, calling attention to the conditions reported by the register, and, without recommendation, you submit the matter for the consideration of the Department.

The provision of the statute referred to is as follows:

That should any of said lands allotted to said Indians or opened to settlement under this act contain valuable mineral deposits, such mineral deposits shall be open to location and entry, under the existing mining laws of the United States, upon the passage of this act; and the mineral laws of the United States are hereby extended over said lands.

In an opinion by the Assistant Attorney-General for this Department, dated October 28, 1901, wherein said provision was considered and construed, it was held, in substance, (1) that lands which have been allotted to Indians, or lands to which a homestead entryman has acquired fixed and vested rights by reason of his compliance with the homestead laws, are not subject to the mining laws or to mineral exploration and entry; (2) that from the time of the passage of the act the body of lands which were to be allotted or opened to settlement under the act were subjected to the mining laws, and to mineral exploration and entry, so far as the same should be found to contain valuable mineral deposits; (3) that such lands were not always to be subject to the mining laws, or to mineral exploration and entry, but, like other lands, only so long as they should remain free from any vested right of ownership in an individual, Indian or white; (4) that upon their allotment in severalty, or upon title thereto being earned

by a homestead entryman by compliance with the homestead law, the lands allotted, or embraced in a homestead entry, cease to be subject to said mineral provision.

There can be no question that the principles stated in said opinion are applicable to lands as to which vested rights of ownership have been acquired under the townsite law, as well as to lands which have been allotted to Indians, or which have been earned by entrymen under the homestead law.

These principles are in entire harmony with those long recognized and uniformly applied by the land department in the administration of the public land laws generally. In the case of *Kern Oil Company v. Clarke* (30 L. D., 550), where the subject was discussed at length and many authorities cited and considered, the Department, among other things, said (p. 556):

In the disposition of the public lands of the United States, under the laws relating thereto, it is settled law: (1) That when a party has complied with all the terms and conditions necessary to the securing of title to a particular tract of land, he acquires a vested interest therein, is regarded as the equitable owner thereof, and thereafter the government holds the legal title in trust for him; (2) that the right to a patent once vested, is, for most purposes, equivalent to a patent issued, and when in fact issued, the patent relates back to the time when the right to it became fixed; and (3) that the conditions with respect to the state or character of the land, as they exist at the time when all the necessary requirements have been complied with by a person seeking title, determine the question whether the land is subject to sale or other disposal, and no change in such conditions, subsequently occurring, can impair or in any manner affect his rights.

In view of the opinion of the Assistant Attorney General, it is clear that the mineral provision of the act of June 6, 1900, was not intended to operate as an exception to the settled principles applied by the land department in the administration of the public land laws generally. Controversies between mineral and agricultural or townsite claimants, as to any of the lands over which the mining laws were extended by said provision, are to be determined upon the same principles which apply to like controversies with respect to the public lands situated elsewhere.

Applications for patent to mining claims should not be received by local officers for any of the lands referred to, which may, at the time, be embraced in an Indian allotment, or in any existing entry under the homestead or townsite laws; and no protest by a mineral claimant, the object of which is to have the land claimed determined to be subject to entry under the mining laws, should be accepted, as against any Indian allotment, or as against any entry under the homestead or townsite laws where the entryman has complied with all of the terms and conditions necessary to entitle him to a patent, unless the protest be accompanied by an allegation or averment, properly verified and corroborated, to the effect that the land was known to contain valuable

mineral deposits at the time when the Indian allotment was approved, or, as the case may be, when the terms and conditions necessary to obtain title under the homestead or townsite laws were complied with. Lands not known to contain valuable mineral deposits at the time when, in the absence of such knowledge, the rights of the allottee, or of the homestead or townsite entryman, become fixed and vested, are not thereafter subject to exploration, location, or entry by other parties under the mining laws. Rights once vested in an allottee or in an entryman under the homestead or townsite laws, or in a town lot purchaser, can not be affected by the subsequent exploration or location of the lands for minerals.

No mining location of land within the county-seat townsites of Lawton, Anadarko, or Hobart, made after the special reservation of those townsites on June 24, 1901, under the act of March 3, 1901 (31 Stat., 1093), is of any validity or effect whatever. Where the lands in these three townsites were so reserved they became appropriated and set apart for a specific purpose under the law, and were thenceforth withdrawn from the operation of the mining and other public land laws.

In the matter of the surveying of mining claims with the view to obtaining patents therefor, the mining laws provide (Sec. 2325, R. S.) that such surveys, excepting as to placer claims located upon surveyed lands, and which conform to legal subdivisions, where no further survey or plat is required (Sec. 2321, R. S.), shall be made by or under the direction of the United States surveyor-general. It is further provided that at the time of filing application for patent to a mining claim, or at any time thereafter, within the sixty days' period of publication, the claimant shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors, and that the plat is correct, with such further description as may be necessary to identify the claim and furnish an accurate description to be incorporated in the patent, and (Sec. 2334, R. S.) that the surveyor-general of the United States shall appoint, in each mining district containing mineral lands, as many competent surveyors as shall apply for appointment, to survey mining claims.

The Congress has made no provision for a United States surveyor-general for the Territory of Oklahoma. Nor is there any provision in the statute extending the mining laws over the aforesaid ceded lands, or in any other, which specially directs or authorizes the duties required to be performed by the United States surveyor-general in the administration of the mining laws generally, as aforesaid, to be performed in said Territory by any other officer. The question arises, therefore, as to how said laws are to be executed with respect to the lands in said Territory over which they were extended by said act of June 6, 1900.

In the absence of special legislation giving full and complete direc-

tions in the premises, resort must be had to the general laws conferring upon the land department jurisdiction and power in matters relating to the surveying and sale of the public lands.

Sections 453 and 2478 of the Revised Statutes provide as follows:

Sec. 453. The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all agents [grants] of land under the authority of the government.

Sec. 2478. The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for.

Referring to these sections, the supreme court, in the case of *Knight v. United States Land Association* (142 U. S., 161, 177), said:

The phrase, "under the direction of the Secretary of the Interior," as used in these sections of the statutes, is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the land department of which he is the head. It means that, in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims and the issuing of patents thereon, and the administration of the trusts devolving upon the government, by reason of the laws of Congress or under treaty stipulations, respecting the public domain, the Secretary of the Interior is the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States.

In *Bishop of Nesqually v. Gibbon* (158 U. S., 155, 167) the court, speaking on the same subject, after referring to and quoting from the opinion in the former case of *Knight v. United States Land Association*, further said:

It may be laid down as a general rule that, in the absence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the land department. It falls there unless there is express direction to the contrary.

The mining laws of the United States, excepting certain amendments and special statutes, not material to be here mentioned, constitute a part of the provisions of the title of the Revised Statutes (Title 32) referred to in said section 2478, and are therefore subject to and fall within the authority conferred by said section.

In view of these general statutory provisions, and of the decisions of the supreme court respecting the same, in the cases referred to, it is clearly the duty of the Commissioner of the General Land Office, in administering the mining laws as extended over the aforesaid ceded lands by the act of June 6, 1900, to perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the

surveying of mining claims located upon said lands, with the view to obtaining patents for such claims, and all similar duties in any manner respecting the conduct of proceedings to obtain such patents; and also, under like direction, to enforce and carry into execution any and every part of the provisions of the mining laws with respect to said ceded lands, not otherwise specially provided for in the act extending said laws over said lands.

You are accordingly directed to appoint in each of the land districts containing mineral lands, wherein said ceded lands are situated, as many competent surveyors as shall apply for appointment to survey mining claims; and you will perform all the duties appertaining to the surveying of mining claims located upon said lands for the purpose of obtaining patents from the government, and with respect to the patent proceedings, which would be performed by the United States surveyor-general if there were such an officer for the Territory of Oklahoma.

For their guidance in the premises, you will furnish to the registers and receivers of the land offices having jurisdiction of applications to enter said ceded lands, copies of this decision. You will also supply said officers with all necessary blanks, with the usual printed instructions relating to the subject of applications for patent to mining claims, and with such special instructions, in accordance with the views herein expressed, as may be deemed proper to secure the effective administration of the mineral provisions of said act of June 6, 1900.

The proposed letter of instructions submitted by your office is herewith returned, without approval.

The applications of A. J. Meers, O. E. Noble, and G. W. Vickers, surveyors, for appointment to survey mining claims upon said lands, transmitted by your letters of September 30, October 3, and October 5, 1901, respectively, are returned for your consideration and action under the directions herein given.

HOMESTEAD—COMMUTATION—RESIDENCE.

FRY *v.* KUPER.

In the commutation of homestead entries constructive residence from the date of the entry will be recognized where settlement is made and residence established within six months thereafter.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *December 6, 1901.* (J. R. W.)

Christian C. Kuper appealed from your office decision of August 5, 1901, holding his commutation proof to be prematurely made on his

homestead entry for the NW. $\frac{1}{4}$ of Sec. 27, T. 103 N., R. 48 W., Mitchell, South Dakota.

December 2, 1896, Kuper made homestead entry. From January 7, 1897, to December 2, 1898, the entry was suspended. Contest proceedings were then instituted by Isaac N. Fry, which were dismissed by departmental decision of November 19, 1900 (unreported). October 7, 1899, Kuper submitted commutation proof, which was held by the local office under rule 53 of practice until close of the contest. It appears from the commutation proof that Kuper claimed residence on the land only from December 19, 1898, to the time of final proof, a period of nine months and eighteen days. Your office decision held:

Commutation proof is premature when made less than fourteen months after actual residence on the land was commenced. See act of June 3, 1896 (29 Stat., 197) The entryman, it appears, was misled by the local officers, but neither their ignorance of the law nor the charge of duress can cure this defect In view of the facts above recited, he will be allowed thirty days from receipt of notice to return to the land and complete a residence (which added to his former residence) will amount to fourteen months, after which he may submit supplemental final proof, and the same will be duly considered by this office.

Kuper appealed, and cites this ruling as error. The argument is that a homestead entryman may commute his entry "after six months constructive residence and eight months actual residence." Citation is made to circular of July 9, 1896 (26 L. D., 544), wherein it is said, respecting the act of June 3, 1896 (29 Stat., 197), that:

The second section of the act modifies the provisions of section 2301, Revised Statutes, as amended by the act of March 3, 1891, *supra*, so as to permit the commutation of homestead entries upon a showing of fourteen months' compliance with the homestead law after the date of *settlement*, instead of after the date of entry, as formerly required. Constructive residence from the date of entry will be recognized where settlement is made and residence established within six months thereafter.

Section 2 of the act of June 3, 1896 (29 Stat., 197), provides: "That all commutations of homestead entries shall be allowed after the expiration of fourteen months from date of settlement."

Nothing in the act indicates, or justifies, a different interpretation of it, where one commutes an entry after fourteen months' compliance, from that given where one consummates an entry in due course after five years' compliance. The Department in construing the act in question in the circular of July 9, 1896, *supra*, gave it the construction that the fourteen months' compliance of one commuting an entry may be of like character as of one consummating an entry, saying that:

Constructive residence from the date of the entry will be recognized where settlement is made and residence established within six months thereafter.

No decision of the Department is found holding otherwise. It therefore is held that a commuting entryman is, equally with others, entitled to credit for constructive residence during the first six months of his entry.

Is the entryman within the rule so announced?

January 7, 1897, being not yet advised of Kuper's entry, your office directed the local office to withhold said tract from disposition until further advised, which the local office received January 15, and the same day reported to your office Kuper's entry. February 1, 1897, William H. Fry filed an application for reinstatement of his previous timber culture entry, on the ground that its cancellation was premature, which was, March 27, 1897, granted by your office, and Kuper was required, within sixty days, to show cause why his entry should not be canceled. This rule was served April 2, 1897, and Kuper appealed. October 18, 1898 (27 L. D., 547), your office decision was reversed, Fry's application denied, and Kuper's entry held intact. December 2, 1898, Fry began contest against Kuper's entry on ground of abandonment. The contest was dismissed on Kuper's appeal to the Department, by its decision of November 19, 1900 (unreported), upon the ground that it was prematurely brought, it being held by said decision that Kuper's—

entry was suspended during the period from January 7, 1897, until the decision of the Department, October 18, 1898, denying Fry's motion for reinstatement and holding Kuper's entry intact.

It was adjudicated that Kuper, although he did not establish actual residence on the tract until December 19, 1898, occupied the status of a resident on the land January 7, 1897, when the entry was suspended, and by reason of the suspension was excused from actual residence until October 18, 1898, so that, excluding the time of such suspension, he established actual residence within six months from the date of his entry, and that he was never in default, but in view of the law was continuously resident of the land. His expensive and persistent assertion of right, in face of a contest, sufficiently attests his good faith in seeking the land for a home. He is therefore entitled to the benefit of the six months' constructive residence.

The heirs of Fry, the deceased contestant, also appealed from your office decision, assigning as error therein that hearing is thereby denied upon their contest filed January 22, 1901, alleging abandonment by Kuper subsequent to October 7, 1899. Residence subsequent to final proof, found to be satisfactory and sufficient, is not required.

Your office decision rejecting Kuper's final proof is reversed.

RAILROAD GRANT—ADJUSTMENT—ACT OF JULY 1, 1898.

BROWN *v.* NORTHERN PACIFIC RY. CO.

The act of July 1, 1898, is limited to conflicting claims upon odd-numbered sections in either the granted or indemnity limits of the Northern Pacific land grant; hence conflicting claims to lands in an even-numbered section are not subject to adjustment under said act.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *December 6, 1901.* (F. W. C.)

Your office letter of July 15, last, presents the facts with regard to the conflicting claims of Benjamin F. Brown and the Northern Pacific Railway Company to the NE. $\frac{1}{4}$ of Sec. 22, T. 9 N., R. 10 W., Helena land district, Montana, with request for instructions as to whether said claims are subject to adjustment under the provisions of the act of July 1, 1898 (30 Stat., 597, 620).

From the statements contained in your said office letter it appears that this tract was selected by the Northern Pacific Railroad Company on November 14, 1882, under the provisions of the act of June 22, 1874 (18 Stat., 194), in lieu of the E. $\frac{1}{2}$ of SE. $\frac{1}{4}$, Sec. 19, T. 13 N., R. 11 W., and the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 29, T. 11 N., R. 3 W., State of Montana.

On October 20, 1897, Brown tendered a homestead application for said NE. $\frac{1}{4}$ of Sec. 22, which was rejected by the local officers for conflict with the pending selection by the Northern Pacific Railroad Company, from which action he duly appealed, and on June 6, 1899, he filed his election to retain said tract under the provisions of the act of July 1, 1898, *supra*, alleging that he settled upon the tract in November, 1893, and that he has made improvements thereon to the value of about \$600.

The act of July 1, 1898, is limited to conflicting claims upon odd-numbered sections in either the granted or indemnity limits of the Northern Pacific land-grant, and in the opinion of this Department the case, as submitted by your office letter, is not subject to adjustment under said act and you are, therefore, directed to adjudicate said case without regard thereto.

OKLAHOMA LAND—HOMESTEAD—EXCESS AREA—ACT OF MAY 17, 1900.

ROBERT F. BOYCE.

The act of May 17, 1900, known as the free homestead act, operated to abrogate the general rule recognized in departmental practice, that requires payment to be made for the excess area embraced in homestead entries containing more than one hundred and sixty acres, in so far as such rule, prior to the passage of said act, affected the entry of lands designated therein.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *December 7, 1901.* (J. H. F.)

This case is before the Department on appeal by Robert F. Boyce from your office decision of June 5, 1901, requiring him to make payment of one dollar per acre for 15.76 acres of land, being the area in excess of 160 acres, embraced in his homestead entry, No. 2105, made

October 24, 1893, for the NE. $\frac{1}{4}$ Sec. 6, T. 24 N., R. 12 W., I. M., in the Alva, Oklahoma, land district, on which entry final proof was made and final certificate issued August 23, 1900.

The payment mentioned appears to have been required by your office in pursuance of a general rule which has obtained in the established practice of the land department whereby an entryman, whose entry embraces more than 160 acres of land, is required to pay the government price per acre for the excess area included therein although the land covered by such entry may constitute only a technical quarter-section.

Boyce's appeal is based upon the contention that he should not be required to make payment for the excess acreage embraced in his entry for the reason that the express provisions contained in the act of May 17, 1900 (31 Stat., 179), known as the free homestead act, operated to relieve him from any payment for such excess which might otherwise have been exacted.

The land involved is a part of what was formerly known as the Cherokee Outlet and was opened to settlement and entry under the provisions of the act of March 3, 1893 (27 Stat., 612, 642). By section 10 of that act it was provided that—

each settler on the lands, so to be opened to settlement as aforesaid, shall, before receiving a patent for his homestead, pay to the United States for the lands so taken by him, in addition to the fees provided by law, the sum of two dollars and fifty cents per acre for any land east of ninety-seven and one half degrees west longitude, the sum of one dollar and a half per acre for any land between ninety-seven and one half degrees west longitude and ninety-eight and one half degrees west longitude, and the sum of one dollar per acre for any land west of ninety-eight and one half degrees west longitude and shall also pay interest upon the amount so to be paid for said land from the date of entry to the date of final payment therefor at the rate of four per centum per annum.

The tract in controversy is situated west of ninety-eight and one half degrees west longitude and is, therefore, of the class of lands the price of which was fixed at one dollar per acre.

By the act of May 17, 1900, *supra*, however, it is provided—

That all settlers under the homestead laws of the United States, upon the agricultural public lands, which have already been opened to settlement, acquired prior to the passage of this act by treaty or agreement from the various Indian tribes, who have resided or shall hereafter reside upon the tract entered in good faith for the period required by existing law, shall be entitled to a patent for the land so entered upon the payment to the local land officers of the usual and customary fees, and no other or further charge of any kind whatsoever shall be required from such settler to entitle him to a patent for the land covered by his entry.

This latter act contains a further provision whereby the payment of all sums of money thereby released and which, if not released, would belong to any Indian tribe, is assumed by the United States, and, it is also therein provided "that all acts or parts of acts inconsistent with the provisions of this act are hereby repealed."

It will be noted that the act of March 3, 1893, in addition to the requirement of residence, also exacted payment by the homestead entryman of the price per acre therein specified "for the lands so taken by him," irrespective of the acreage of the tract entered, such payment being exacted for all the land covered by his entry regardless of whether the area embraced therein was more or less than 160 acres. Prior to the passage of the act of May 17, 1900, therefore, the requirement to make payment for land, in excess of 160 acres, embraced in homestead entries, made upon the Cherokee Outlet, rested not alone upon the established rule, hereinbefore referred to, which has obtained in the matter of excess payments generally, but also upon the express statutory provision contained in the act of 1893, *supra*.

The decision from which the appeal herein was taken proceeds upon the theory that, while the act of 1900, *supra*, repealed the provisions contained in section 10 of the act of 1893, *supra*, in so far as the same exacted payment by the entryman for the land so entered by him, it did not operate to change the force and effect of the established rule which has obtained requiring payment to be made for the excess acreage contained in all entries embracing more than 160 acres of land. In this decision the Department is unable to concur.

By the express terms of the act of May 17, 1900, every homestead settler upon the lands therein designated, who had resided or who should thereafter reside upon the tract entered for the period required by existing law, was to be entitled to a patent "for the land so entered" upon payment to the local officers of the "usual and customary fees." The land involved herein is of the class designated in that act and Boyce perfected final entry thereof after making proof of residence thereon for the full period of five years and has paid to the local officers the usual and customary fees. He has, therefore, apparently complied with all the express requirements prescribed by the act in question to entitle him to a patent for the land entered, and those express provisions, if standing alone, would appear to furnish sufficient evidence of an intention on the part of Congress to relieve entrymen, coming within the purview thereof, from making payment for any part of the land entered. But as additional evidence that such was the legislative purpose, it will be noted that it was also enacted that "no other or further charge of any kind whatsoever" should be required from the settler to entitle him to a patent "*for the land covered by his entry,*" and all acts and parts of acts inconsistent with the provisions so enacted were expressly repealed. This language is not of doubtful import. Aside from the repealing clause referred to, it clearly discloses that Congress intended to thereby exempt homestead settlers on the lands designated, who perfected title thereto by residing thereon for the full period required by existing law, from making any payment for the tracts covered by their respective entries without regard to the area

of the land embraced therein, and, when the force and effect of the repealing clause is considered, it only renders more certain the legislative purpose which is otherwise sufficiently manifest.

The general rule, established by settled practice, requiring payment to be made for excess acreage embraced in entries made under the general provisions of the homestead laws, in so far as the same may have affected the land in question prior to the passage of the act of 1900, *supra*, certainly could not have been of any greater force and effect than the special statutory provision relating thereto contained in the act of 1893, which exacted payment not only for the excess acreage but for all the land entered, and Congress, by the later act, having expressly repealed all acts and parts of acts inconsistent therewith, it is unreasonable to conclude that it intended to leave in force, as to the lands designated, the rule mentioned, which is not only equally inconsistent with the express provisions of the later act, but would, if given effect, put in operation, to the extent of the excess lands, a provision similar to that contained in the act of 1893, *supra*, which was expressly repealed.

The Department is, therefore, of opinion that the act of May 17, 1900, *supra*, operated to abrogate the rule in question in so far as the same affected the lands designated therein and that Boyce should not be required to make payment for any part of the land embraced in his entry. Your office decision is, accordingly, reversed.

HOMESTEAD—SOLDIERS' ADDITIONAL—SECTIONS 2304, 2305, 2306, R. S.

LESLIE M. HAMILTON.

The provisions in section 2305, R. S., with respect to soldiers "discharged on account of wounds received or disability incurred in the line of duty," were made solely with respect to the credit that should be allowed a soldier for his military service in computing the period of his residence under an original entry, and in no way can be invoked as bearing upon the qualifications of an applicant under section 2306, whose status in that respect must be determined under limitations found in section 2304.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) December 7, 1901. (C. J. G.)

Leslie M. Hamilton, assignee of the claimed soldiers' additional homestead right of James V. Radley, appeals from your office decision of August 26, 1901, rejecting his application to enter, under section 2306 of the Revised Statutes, the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 12, and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 13, T. 16 N., R. 14 E., Lewiston, Montana, land district.

The basis of your said office decision is that—as shown by the records of the War Department—the soldier served less than ninety days during the civil war, and was not discharged for disability incurred

in the line of duty, "even if in that case he would be entitled to the additional right."

Section 2306 of the Revised Statutes is expressly limited to the particular class mentioned in section 2304, namely, those who have served in the Army, Navy, or Marine Corps of the United States during the war of the rebellion, for ninety days. The provisions in section 2305 of the Revised Statutes with respect to soldiers "discharged on account of wounds received or disability incurred in the line of duty" were made solely with respect to the credit that should be allowed a soldier for his military service in computing the period of his residence under an original entry, and in no way can be invoked as bearing upon the qualifications of an applicant under section 2306, whose status in that respect must be determined under limitations found in section 2304.

With this modification your said office decision is affirmed.

HOMESTEAD—QUALIFICATION—OWNERSHIP OF LAND.

BICKFORD *v.* McCLOSKEY.

One owning one hundred and sixty acres of land in his own right, and also holding the title to other land, in trust for another, without any beneficial interest in himself, is not for that reason disqualified to make entry under the general provisions of the homestead law.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. C. P.) December 9, 1901. (J. R. W.)

William H. McCloskey appealed from your office decision of July 9, 1901, holding for cancellation his homestead entry for lots 2 and 3, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 3, T. 117 N., R. 65 W., 5th P. M., Huron, South Dakota.

September 16, 1899, McCloskey made homestead entry for the land. March 15, 1900, Harry Bickford filed a contest affidavit, alleging that McCloskey was owner of more than one hundred and sixty acres of land when he made the entry. Notice issued March 15, was served June 4, for hearing at the local office July 10, 1900, when both parties appeared and fully participated in the hearing.

The entryman admitted that at the time of his entry he held legal title to two hundred and forty acres of land, but set up the affirmative defense that eighty acres of the land so held were held in trust for his brother, Peter. Upon the fact the finding of the local office was that:

In April, 1897, after his father's death, he entered into an agreement with his brother Peter, the minor, to the effect that if he, Peter, "would do what was right until he was twenty-one years of age, he would give him that piece of land free from all incumbrances." Peter is said, and himself admits, having agreed to such arrangement. It appears that in pursuance of the agreement, William H. McCloskey, this

defendant, entered into negotiation with one Watkins, in May, 1899, for the purchase of "that piece of land" for the minor brother. That after stating the case to Watkins, McCloskey being unable to pay the entire purchase price for the land, the former declined to entertain the proposition that he deed the land to said minor and from him accept a mortgage for the remaining and unpaid part of the purchase price, because it is said he could not protect himself as against the minor, and, therefore, suggested that William H. McCloskey himself purchase the land and take title in his own name. It appears that upon that suggestion the deal was closed with William H. McCloskey, as the purchaser of the land in fee simple, and at the same time remaining tenant in mortgage to said Watkins April 10, 1900, evidenced by the instrument itself and marked for purposes of identification Exhibit A, William H. McCloskey, by warranty deed, in consideration [recited] of the sum of Four Hundred Dollars to him in hand paid by the party of the second part (Peter McCloskey), conveyed to him and to his heirs and assigns forever the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 26, Tp. 118 N., R. 65 W., 5th P. M.

These facts are found, and examination of the evidence shows that they are fully substantiated by all of the parties in interest, Watkins, who sold the land to McCloskey, William H. who made the purchase, Peter for whom he purchased, and a brother Edward, who was consulted and as friend and advisory party took part in the transaction. No attempt was made to rebut the fact that the land was avowedly purchased for the minor; that conveyance to the entryman was made merely because the vendor refused to accept the minor's mortgage for the unpaid purchase money.

Upon William fell the charge of the family affairs at his father's death. He testified:

My mother is a widow, and he [Peter] and I had both been living at home, and I was running the home place and have been since my father's death three years ago last April [1897], and I told him that if he would do what was right until he was twenty-one years of age that I would give him that piece of land free from all incumbrances. I bought it of one Watkins, in pursuance of that agreement, and stated the case to him and he said it was as good a thing as I could do.

Pomeroy's Equity Jurisprudence, section 1031, thus defines "Resulting Trusts:"

Resulting trusts, therefore, are those which arise where the legal estate in property is disposed of, conveyed or transferred, but the intent appears or is inferred from the terms of the disposition, or from the accompanying facts and circumstances, that the beneficial interest is not to go or be enjoyed with the legal title. In such case a trust is implied or results in favor of the person for whom the equitable interest is assumed to have been intended and whom equity deems to be the real owner. This person is the one from whom the consideration actually comes, or who represents, or is identified with the consideration; the resulting trust follows or goes with the real consideration.

Whether William "was running the home place" in the interest of the family, or on his own account, does not appear in the evidence. In the one case he would stand *in loco parentis* to his minor brother, and a purchase in his name would be supported as an advancement. Perry on Trusts, Sec. 144; Harris v. Elliott, 45 W. Va., 245. The

purchase was made in Peter's name, avowedly for him, and though the payment was made of William's money, it was paid for Peter, and must be regarded as paid by him. Had William first handed the money to Peter, in consideration of love and affection, as an advancement, no one but a creditor of William could have questioned the transfer. If it had been handed over as payment upon two years' labor on William's farm, no doubt could arise. That William merely handed it himself to Watkins in a purchase for Peter did not make it the less Peter's money. The deed was made to William merely because Watkins erroneously supposed that, because Peter, the real grantee, was a minor, he could not make a valid purchase-money mortgage for the remainder of the purchase price. Neither the manner of payment, nor the conveyance to William because of a mistake about the capacity of a minor to make a valid purchase-money mortgage, affected the real intention of the parties, nor can affect the nature of the transaction. These circumstances only affect the nature and degree of proof requisite to show that the real transaction was not truly evidenced by the written instruments. The proof is adequate, clear, cogent, persuasive, and convincing. William, as the result, held the legal title as mere dry trustee for Peter, with no beneficial interest in himself. April 10, 1900, before any notice of the contest, and without any consideration of value in fact paid, he conveyed to the beneficiary. That fact is material only as a corroborative circumstance that he had in fact no interest or ownership in the land, and that such conveyance was not in the nature of a self-serving declaration.

It remains to consider whether legal title held only in the capacity of dry trustee is within the inhibition of the statute and disqualifies the holder from making a homestead entry. In *Gourley v. Countryman* (27 L. D., 702, and 28 L. D., 198), it was held that complete equitable title to land, and right to the legal title, in excess of the amount limited by the act of May 2, 1890 (26 Stat., 91), disqualified the holder, and is within the meaning of that act a *fee simple*. In *Myers v. Croft*, 13 Wall., 291, 297, it was held that the statute invalidating conveyances of land by a pre-emptor before issuance of patent did not inhibit a conveyance after final proof, when the law had been complied with and the entire equitable right was vested.

The object of the law in question was to prevent the obtaining of public land in excess of the amount limited and to promote the policy of distribution of the public lands to citizens in small holdings. The holding of title to land in which the person has no beneficial or real ownership is not obnoxious to this policy, and can not be held to be within the purpose of the statute. To hold that it is not is the necessary corollary to the decision in *Gourley v. Countryman*, *supra*. Logically, if the ownership of the entire equitable estate without the legal estate is within the statute, obviously the ownership of the dry

legal estate without any beneficial interest is not. The statute must be equitably construed to effectuate the legislative intent.

Your office decision is, therefore, reversed, the contest is dismissed, and the entry will stand intact.

HOMESTEAD—RESIDENCE—ACT OF JUNE 16, 1898.

MURRAY *v.* CHAPMAN.

The default of a homestead entryman in the matter of establishing residence is not cured, under the act of June 16, 1898, by his enlistment in the military or naval service of the government in time of war.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) December 12, 1901. (C. J. G.)

Moroni Murray appealed from your office decision of August 14, 1901, dismissing his contest against Herbert J. Chapman's homestead entry for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 25, T. 6 N., R. 94 W., Glenwood Springs, Colorado.

August 6, 1896, Chapman made homestead entry. August 1, 1900, Murray filed contest affidavit, alleging failure to establish residence and abandonment since date of the entry, not due to employment in the army or navy of the United States. September 24, 1900, hearing was had at the local office, after service by publication, defendant making default. Evidence adduced by contestant showed that defendant never resided on, cultivated, or improved the land, which default, to the best knowledge and information of the witnesses, was not due to military or naval service. The local office found for the contestant and recommended cancellation of the entry. No appeal was taken.

January 31, 1901, pending consideration of the record in your office, John Chapman, father of Herbert J. Chapman, filed affidavit that the entryman was then serving in the army of the United States in the Philippines. Upon inquiry by your office, the War Department reported that:

Herbert J. Chapman was enlisted on the 3rd day of July, 1899, at Denver, Colo., and was assigned to Company L, 4th regiment of U. S. Infantry. Muster roll for Nov. and Dec., 1900 (latest on file), shows him "present in the Philippines a pvt." No record of discharge.

Contestant was notified by direction of your office letter of April 5, 1901, of this report, and that unless he applied within thirty days for a further hearing the contest would be dismissed for the reason that—

Under the act of June 16, 1898 (30 Stat., 473), a settler who enlists in the U. S. Army, Navy, or Marine Corps, is held to be constructively upon his homestead, and therefore a contest against his entry while in such service cannot be entertained.

May 20, 1901, the local office having asked instructions upon the contestant's application for a further hearing, your office limited the scope of the hearing to evidence that the entryman was not serving in the United States army in the Philippines or elsewhere. The contestant protested against so limiting the hearing, alleging that he could prove that the entryman abandoned the land long before the Spanish War; that John Chapman, November 10, 1898, initiated contest against the entry, charging abandonment "during the past year," which was allowed to lapse because John Chapman sold improvements he had put on the land to contestant and put him in possession.

June 21, 1901, your office dismissed the protest and adhered to the former ruling as to the scope of the inquiry. July 29, 1901, Murray filed motion for a final decision, admitting inability to disprove that the entryman was then, and at initiation of the contest, so engaged in the military service of the United States. August 14, 1901, your office decision dismissed the contest, from which Murray appealed to the Department.

The evidence conclusively shows that the entryman never established residence on the land and was in default nearly two and a half years prior to his enlistment. The sole question presented is, whether default of establishing residence is cured by enlistment in the military or naval service of the government in time of war.

By reference to former legislation on the same subject, it will be seen that the act of June 16, 1898 (30 Stat., 473), is in large part modeled upon sections 2308 and 2305 of the Revised Statutes, which are, respectively, a codification of sections 4 and 1 of the act of June 8, 1872 (17 Stat., 333). The act of June, 1898, provided:

That in every case in which a settler on the public land of the United States under the homestead laws enlists or is actively engaged in the army, navy, or marine corps of the United States as a private soldier, officer, seaman, or marine, during the existing war with Spain, or during any other war in which the United States may be engaged, *his services therein shall, in the administration of the homestead laws, be construed to be equivalent to all intents and purposes to residence and cultivation for the same length of time upon the tract entered or settled upon; Provided, That no patent shall issue to any homestead settler who has not resided upon, improved and cultivated his homestead for a period of at least one year after he shall have commenced his improvements.*

It will be seen that the matter first above italicized is, with two verbal changes, taken from section 2308 of the Revised Statutes, and the concluding portion italicized is from section 2305 of the Revised Statutes. In other words, the act in question is a re-enactment of the act of June 8, 1872, with changes and additions, (1) making it general, to apply to the then existing or any future war, and (2) to impose a rule of pleading and proof calculated to assure its greater efficiency. The first of these changes was necessary because the act of 1872 had been construed to be ephemeral, applying only to soldiers in the army

of the Union during the War of the Rebellion. Jeff C. Davis (26 L. & R., 342); W. A. Jones (1 L. D., 98); Owen v. Lutz (14 L. D., 472); Opinion, May 13, 1898 (26 L. D., 672). It will be seen that the act followed closely upon the opinion, *supra*, of the preceding month, and is the legislative response to that opinion.

It is a familiar rule for statutory construction that a statute, when re-enacted, or provision of statute adopted into another, is to receive the same construction that such statute or provision had previously received. This rule is of so strong force that where the legislature of one State adopts a statute from another State previous judicial construction of the statute is deemed to be thereby adopted. Obviously, where the legislature re-enacts its own former act, or embodies former provisions in a new act on the same general subject, it does so in view of the former construction, and adopting it, unless something in the new act indicates a different intention. In the light of this rule, and with reference to its history and origin, a construction of the act of June 16, 1898, must be sought.

In Hall v. Wade (6 L. D., 788), in construing this provision in the act of June 8, 1872, at page 791, it was said:

He never established his residence on the land, and for that reason his enlistment and service in the United States army, as claimed, even if proven, could not avail him. Service in the army of the United States cannot be construed to be equivalent to a residence on land claimed under the homestead law, during the time of such service, in cases where no residence has ever been established.

The case of Hall v. Wade, *supra*, might properly have been decided on other grounds, as the entryman's military service was subsequent to the War of the Rebellion. In Graham v. Hastings and Dakota Railway Company (1 L. D., 362, 366), and St. Paul, Minneapolis and Manitoba Railroad Company v. Forseth (3 L. D., 446, 448), it was held that one of the objects of the act was to cure defective entries which, under an erroneous construction of the act of March 21, 1864 (13 Stat., 35; Sec. 2293 R. S.), had been allowed without residence. In Owen v. Lutz, *supra*, page 474, it was held that the establishment of residence is essential.

That Congress did not intend to cure existing defaults, or make enlistment a cure for pre-existing default, is clear from changes in the wording of the former act in the re-enactment. The act of June 8, 1872, provided that: "Where a party at the date of his entry of a tract of land was actually enlisted and employed his services therein shall be equivalent to a residence." The act of June 16, 1898, differently provides: "That in every case in which a settler on the public lands of the United States under the homestead laws enlists or is actually engaged his services therein shall be equivalent to residence," &c., and in the rule for pleading and proof the words are,

"*the settler's* alleged absence," and the provisos speak of "*such settler*" and "*homestead settler*." The change from "*a party*" to "*a settler*" is significant, and the term "*settler*" four times repeated indicates that Congress had in view, not the preservation of claims without merit by curing existing defaults of those who had never established residence, or who had abandoned their claims, but the relief of meritorious cases, where a patriotic settler, in good faith complying with the law, offered his service to the government.

In *Chesser v. O'Neil* (30 L.D., 294), the Department held that a default, existing before the outbreak of war and continuing after a state of war exists, is presumed to be due to the same motive or cause. The legal presumption of the continuity or motive is applicable here, where it is shown that prior to the war, and during a state of war, there was for nearly three years an entire failure of the entryman to establish residence or to make an actual settlement.

The act was not intended to grant or confer rights or to reinstate rights abandoned or forfeited. It is not a curative statute. Its words are not apt to such purpose. On the contrary, its purpose was to preserve rights existing and being asserted. It is a conserving statute, intended to prevent defaults from arising. In *Harris v. Radcliffe* (2 L. D., 147), in a somewhat similar case of absence by an officer engaged in public duty, the Department held that:

A rule which sanctions the constructive performance of a duty, upon which rights are dependent by force of positive law, may be properly employed to save rights acquired by a partial performance of such duty, but not to confer rights upon one who has made no effort to perform it.

That such was the purpose of Congress, and that it so understood the measure, appears by the report of the Committee on Public Lands, which reported the bill, and that:

The object of this bill is apparent on its face. It simply provides that homesteaders who enter the military or naval service of the United States shall have time they are absent in such service counted in making their final proof, the same as if they *continued to reside* on the land.

And in the debates upon the bill it was stated that:

This bill is intended to protect and cover the rights of *settlers* who enlist in this war—men who *had homes and who since establishing them* have enlisted in defense of their country.

It is, therefore, the opinion of the Department that, upon a proper construction of the act of June 16, 1898, a default in the matter of establishing residence is not cured by enlistment in the military or naval service of the government in time of war.

Your office decision is reversed and Chapman's entry will be canceled.

FOREST RESERVATION—USE OF TIMBER AND STONE—PARAGRAPH 21
OF RULES AND REGULATIONS AMENDED.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., December 12, 1901.

Paragraph 21 of the Rules and Regulations Governing Forest Reserves, issued April 4, 1900, and amended March 19, 1901, is further amended so as to read as follows:

FREE USE OF TIMBER AND STONE.

21. The law provides that—

The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by *bona fide* settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such reservations may be located.

This provision is limited to persons resident in the State or Territory where the forest reservation is located who have not a sufficient supply of timber or stone on their own claims or lands for the purposes enumerated, or for necessary use in developing the mineral or other natural resources of the lands owned or occupied by them. Such persons, therefore, are permitted to take timber and stone from public lands in the forest reservations under the terms of the law above quoted, strictly for their individual use on their own claims or lands owned or occupied by them within the State or Territory where such reservation is located, but not for sale or disposal, or use on other lands, or by other persons: *Provided, however,* That the provisions of this paragraph shall not apply to companies or corporations. Before any timber or stone can be taken hereunder from the forest reserves, the person entitled thereto must first make application to the forest supervisor in charge of the reservation, or part of reservation, setting forth his residence and post-office address, designating the location, amount, and value of the timber or stone proposed to be taken, the place where and the purpose for which the said timber or stone will be used, stating, in case the application is for timber, what sawmill or other agent, if any, will be employed to do the cutting, removing, and sawing, and pledging that no more shall be cut from the reservation than he actually needs for *bona fide* use on his own land or claim; and that none shall be sold, disposed of, nor used on any other than his own land or claim; and guaranteeing to remove and dispose of all tops, brush, and refuse cutting beyond danger of fire therefrom. Upon receipt of the application, the supervisor will immediately make inves-

tigation of the facts in the case. If, in his judgment, the application be meritorious, and no injury to the forest cover will result from the removal of such timber, he will thereupon approve such application, giving the party permission to remove the timber under the supervision of a forest officer: *Provided*, That where the stumpage value of the timber exceeds twenty dollars, permission must be obtained from the Department, and for this purpose the supervisor, in all such cases, will submit the application to the Commissioner of the General Land Office, with his recommendation thereon. In case the application be approved, the supervisor will be notified and the cutting will be allowed, under supervision, as in cases where the amount involved is less than twenty dollars. Every forest supervisor having charge and supervision of the cutting of timber under the foregoing regulations will submit quarterly reports to the Commissioner of the General Land Office for transmission to the Department, in order that the Secretary of the Interior may be advised of the quantity of timber cut and whether the privilege granted is being abused. These reports should show the names of the persons who have applied, during the quarter, for permission to cut timber free of charge, the kind of timber applied for, the quantity, the stumpage value of the same, and the purpose for which the applicant desired to use it. In cases of emergency, where needy persons require immediate relief in the form of a load of dry firewood, the supervisor has authority to grant such privilege without marking or measuring the material beyond assigning to the applicant the particular area where to cut this material; all cases of this kind to appear in the usual monthly report.

BINGER HERMANN, *Commissioner*.

Approved, December 12, 1901.

E. A. HITCHCOCK,

Secretary of the Interior.

WAGON ROAD GRANT—ADJUSTMENT—ACT OF JUNE 22, 1874.

EASTERN OREGON LAND CO.

The provisions of the act of June 22, 1874, relating to the adjustment of railroad land grants, can not be applied in the adjustment of conflicting claims to lands within the limits of a wagon road grant.

Roberts v. Oregon Central Military Road Co., 19 L. D., 591, overruled.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *December 14, 1901.* (F. W. C.)

The Department has considered the letter from resident counsel for the Eastern Oregon Land Company, successor in interest to The Dalles Military Road Company, in which attention is called to a number of

entries which it claims were erroneously allowed and patented for lands within the limits of the grant made by the act of February 25, 1867 (14 Stat., 409), and in which it is further stated that the land company will, upon proper request from your office, relinquish all its right, title and interest in and to said lands provided the company is permitted to select other lands in lieu thereof within the limits of its grant, under the provisions of the act of June 22, 1874 (18 Stat., 194).

The act referred to is one relating to the adjustment of railroad land grants and being thus specifically limited in its operation it is the opinion of this Department that its provisions can not be applied in the adjustment of conflicting claims to lands within the limits of a wagon road grant. The Department is aware that the provisions of said act were applied in the case of *Roberts v. The Oregon Central Military Road Company* (19 L. D., 591), but with the views above expressed it must refuse to follow said decision.

The letter referred to is herewith inclosed for the files of your office relating to the wagon road grant and you will advise the attorneys for the wagon road company of the holding herein made.

FOREST RESERVATION—LIEU SELECTION—ACT OF JUNE 4, 1897.

MARY E. COFFIN,

Where the owner of lands covered by a patent, acting under the act of June 4, 1897, executed a deed of relinquishment thereof to the United States and recorded the same in the proper county office conformably to existing departmental regulations, while the lands were within the limits of a forest reservation, he became entitled, within a reasonable time, to complete the transaction by the selection of public lands in lieu of those relinquished, notwithstanding the subsequent exclusion from the reservation and restoration to the public domain of the relinquished lands.

Directions given for the preparation of appropriate regulations covering contingencies such as presented in this case.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) December 19, 1901. (J. R. W.)

Mary E. Coffin appealed from your office decision of May 24, 1901, rejecting her forest lieu land selections for lots 2 and 15, Sec. 1, and lot 3, Sec. 8, T. 64 N., R. 14 W., and lot 4, Sec. 31, T. 63 N., R. 16 W., 4th P. M., in lieu of NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 24, and SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 23, T. 28 N., R. 14 W., W. M., presented April 13, 1900; for lot 1, Sec. 21, T. 64 N., R. 14 W., 4th P. M., in lieu of lot 6, Sec. 1, T. 29 N., R. 13 W., W. M. presented April 14, 1900; and for lot 1, Sec. 1, lot 5, Sec. 21, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 12, and SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 9, T. 64 N., R. 14 W., 4th P. M., in lieu of S. $\frac{1}{2}$ SE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 23, and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 25, T. 28 N., R. 14 W., presented April 13, 1900, — all in lieu of relinquished or base lands in

the Olympic forest reservation, Washington. The selected lieu lands are in the Duluth land district, Minnesota.

The three deeds of Mrs. Coffin, relinquishing the base lands to the United States, were executed at St. Louis county, Minnesota, March 23, 24, and 26, 1900, respectively, and were filed for record in the office of the register of deeds in Clallam county, Washington, wherein the relinquished lands lay, March 27, 28, and 30, 1900. April 7, 1900 (31 Stat., 1962), the President, by proclamation, excluded from said reservation and restored to the public domain that portion of the reservation embracing the relinquished lands, used as bases for said selections.

The lieu land provision in the act of June 4, 1897 (30 Stat., 36), reads:

That in cases in which a tract covered by an unperfected *bona fide* claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the law respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

This provision was amended by the act of June 6, 1900 (31 Stat., 614), but the amendment is not here material.

June 30, 1897 (24 L. D., 589), instructions were issued, partially prescribing, among other things, the method of proceeding under the lieu land provision in the act of June 4, 1897. Paragraph 16 of these instructions reads:

Where final certificate or patent has issued, it will be necessary for the entryman or owner thereunder to execute a quitclaim deed to the United States, have the same recorded on the county records, and furnish an abstract of title, duly authenticated, showing chain of title from the government back again to the United States. The abstract of title should accompany the application for change of entry, which must be filed as required by paragraph 15, without the affidavit therein called for.

This was repeated in the instructions of April 4, 1900 (30 L. D., 23, 28).

At the time of the execution and recording of the deeds of relinquishment to the United States the lands relinquished were included within the limits of a public forest reservation. In executing and recording the deeds Mrs. Coffin was proceeding to bring herself within the terms of the act of June 4, 1897, and this in the manner prescribed in existing departmental regulations. Before selections could be made, deeds of relinquishment had to be executed, transmitted to the proper recording office, there recorded, and then transmitted to the local land office, where the lands to be selected were subject to disposition. Upon the recording of the deeds of relinquishment abstracts of title had to be obtained and also transmitted to the local land office where the selections were to be made. In every instance the performance of

these prerequisites to a lieu selection requires some time, and in many instances it requires a considerable time. Generally, the local land office is not in the same place or town where the deed of relinquishment must be recorded and the abstract of title made. Oftentimes they are so widely apart that some days are required in the transmission of the necessary papers from the one place to the other. Here, the place of recording the deeds of relinquishment and obtaining the abstracts of title was in the county seat of Clallam county, Washington, while the local land office was in Duluth, Minnesota.

Mrs. Coffin could not have known, and could not have been required to anticipate, at the time of executing and recording the deeds of relinquishment, that the President would, by proclamation, within a few days thereafter, change the boundaries of the forest reservation in such manner as to exclude the relinquished lands from the limits of the reservation. Until her deeds of relinquishment were recorded the matter was wholly within her control, but after that was accomplished the title to the land appeared, by the records of the county, to be in the United States. Even if the deeds of relinquishment have to be accepted by the proper officers of the land department before they will be fully effective as conveyances to the United States, nevertheless the record of the deeds in the recording office of the county where the lands are situate constitutes a serious cloud upon Mrs. Coffin's title and will seriously impair her opportunities to sell or otherwise dispose of the lands. Congress has provided no means for reconveying the lands to her, and she cannot, without the permission of Congress, which has not been granted, bring a suit against the United States to cancel the deeds or remove the cloud from the title. The situation here disclosed should have been anticipated and provided for in the instructions or regulations issued under the lieu land act, but this was not done and the case must therefore be dealt with in a manner which will do justice in this unexpected contingency, if that can be done without violating any provision of the lieu land act or other act of Congress. As Mrs. Coffin can, under existing legislation, neither obtain a reconveyance from the United States nor a decree canceling her deeds of relinquishment, the only course open is to permit her to complete the exchange of land, which was begun by her and partially completed, in full conformity with the lieu land act and the regulations thereunder, and which would have been carried to completion within a reasonable time but for the proclamation of the President excluding from the forest reservation that portion thereof which included the relinquished lands. It is believed that it is within the competency of the Secretary of the Interior to give effect to the equities of Mrs. Coffin's claim and to permit a completion of this exchange (*Williams v. United States*, 138 U. S., 514, 524), and your office is directed to carry the same to completion, if there are no other objections.

Your office is also directed to prepare and submit appropriate regulations covering contingencies like the one here disclosed, so that the owners of tracts covered by a *bona fide* claim or patent, within the limits of a public forest reserve, as well as the officers of the several local land offices, may be correctly informed in the premises. Such regulations should require the selections to be perfected within a reasonable time.

MINING CLAIM—NOTICE—SECTION 2324, R. S.

THE GOLDEN AND CORD LODE MINING CLAIMS.

Section 2324, R. S., is a statute of forfeiture and should be strictly construed. Said section authorizes proceedings to be had against a delinquent co-owner of a mining claim, only by "the co-owners who have performed the labor or made the improvements" required. A co-owner who has not made the required expenditures is not within the terms of the statute and is not in a position to take advantage of its forfeiture provisions.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) December 20, 1901. (A. B. P.)

July 9, 1900, John C. Miller filed application for patent to the Golden and the Cord lode mining claims, survey No. 13,698, Leadville, Colorado. Notice of the application appears to have been published and posted as required by law. No adverse claim was filed, and on December 20, 1900, Miller was allowed to make entry for the claims.

May 24, 1901, Edward Bingaman filed his protest against the issuance of patent upon the entry in Miller's name, alone, alleging that he is, and has been ever since 1893, the owner of an undivided one-half interest in the claims embraced in the entry, and asking that a rule be laid upon Miller requiring him to show cause why protestant's name should not be inserted in the patent when issued upon said entry.

It appears from the record that said claims were originally located as follows: The Cord, July 23, 1891, by Miller; and the Golden, June 14, 1893, by Miller and Bingaman. May 10, 1893, Miller conveyed to Bingaman a one-half interest in the Cord claim. A relocation, amendatory of the original, was made of each claim by Miller, alone, November 21, 1899, under section 3160 of Mills' Annotated Statutes of Colorado. Said section provides:

Re-location by owner—amendatory or additional certificate—conditions. If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing his surface boundaries, or of taking in any part of an over-lapping claim which has been abandoned, or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefits of this act, such

locator, or his assigns, may file an additional certificate, subject to the provisions of this act: *Provided*, That such re-location does not interfere with the existing rights of others at the time of such re-location, and no such re-location or other record thereof shall preclude the claimant or claimants from proving any such title or titles as he or they may have held under previous location.

It further appears that in 1898 Miller caused to be published in a daily newspaper at Leadville, Colorado, for ninety days, consecutively, commencing May 20, 1898, the following notice.

NOTICE OF FORFEITURE.

State of Colorado, }
County of Lake, } ss.

To Edward Bingman and Walter Lyons, their heirs and assigns: You are hereby notified that I have expended, in labor and improvements, for the years 1895 and 1897, the sum of \$100 for each of these years upon what is known as the "Cord" lode and the "Golden Cord" lode, all in the Little English gulch, California mining district, Lake county, Colorado, in order to hold said claims under the provision of section 2324 of the revised statutes of the United States and the amendment thereto, approved January 22nd, 1880, concerning annual labor upon mining claims, being the amount required to hold said claims for said year; and if, within ninety days from date of last publication of this notice, you fail to pay me your proportion of said expenditures, your interest in said properties will have been forfeited to

JOHN C. MILLER.

Section 2324 of the Revised Statutes, referred to in said notice, provides with respect to annual expenditure upon mining claims, among other things, as follows:

On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim. . . . Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures.

The protestant further alleges that a second or supplemental notice under section 2324 was published by Miller after he had made entry; that within the time limited by the statute the protestant paid the cost of said second publication, and tendered to Miller and to his alleged assignee of said claims the sum of \$200, one-half of the expenditure claimed in the notice to have been made by Miller upon said claims; and that said tender was refused by both Miller and his said assignee.

The protest is accompanied by what purports to be a copy of the second or supplemental notice, together with certain affidavits showing the publication thereof, the payment by the protestant of the cost of publication and the tender by him of the amount called for in the notice, and the refusal of such tender by both Miller and his assignee, as alleged. The following explanatory statement is contained in the notice:

An original notice of forfeiture was published to Edward Bingman and Walter Lyons in *The News Reporter*, a daily newspaper published at Leadville, Colorado, from to wit: May 20th to August 20th, (both inclusive) A. D. 1898; therein the "Golden" lode above mentioned was erroneously called the "Golden Cord" lode. This additional and supplemental Notice of Forfeiture being published for the express purpose of correcting the above named error.

By decision of June 12, 1901, your office held that the notice published in 1898 was a sufficient compliance with the statute, and dismissed the protest. The protestant thereupon appealed here.

The appeal was served upon the parties claiming under the entry, and they have appeared and filed a brief in answer thereto.

There is no denial that a second notice was published by Miller, as set forth in the protest, or that payment of the cost thereof and tender of the amount called for therein were made as alleged.

The appellant contends that the notice of 1898 was not in accordance with the requirements of the statute; that it was insufficient for the purpose intended, and could not and did not affect his interest in said mining claims. This contention is combatted by the appellees, who insist that said notice was in all respects in due compliance with the law, and that in view thereof, and by reason of appellant's failure to contribute his proportion of the expenditure therein stated to have been made, and in the manner therein required, he has forfeited the interest he formerly had in said claims. The question of the sufficiency of this notice is the controlling question in the case. It is not shown why the name of Walter Lyons was included in the notice, nor is any question raised in respect thereto.

The supreme court of the United States has held that the statute under which said notice was published is one of forfeiture and should be strictly construed (*Turner v. Sawyer*, 150 U. S., 578, 585). To the same effect are the cases of *Brundy v. Mayfield et al.*, decided by the supreme court of Montana (38 Pac. Rep., 1067, 1068), and *Royston v. Miller*, decided by the United States circuit court for the district of Nevada (76 Fed. Rep., 50, 54).

In *Lindley on Mines* (Vol. 2, Sec. 646, p. 820) the author, speaking of this statute, says:

All courts agree that the statute must be strictly construed. Certainly no presumptions of either fact or law will be indulged in when its application is invoked.

The statute authorizes proceedings to be had against a delinquent

co-owner, only by "the co-owners who have performed the labor or made the improvements" required. A co-owner who has not made the required expenditures is not within the terms of the statute and is not in a position to take advantage of its forfeiture provisions.

In the notice of 1898 Miller only claimed to have expended \$100 in labor and improvements upon the two mining claims therein mentioned, for each of the years 1895 and 1897. The sum of \$200 was the total expenditure made by Miller, according to his own showing, upon the two claims for the two years with respect to which contribution by Bingaman is called for in the notice. The provision of the statute bearing upon this matter is as follows:

On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. . . . but where such claims are held in common, such expenditure may be made upon any one claim.

In *Chambers v. Harrington* (111 U. S., 350, 353) the supreme court, referring to the provisions allowing the annual expenditure to be made upon one of several claims held in common, said:

But obviously on this one the expenditure of money or labor must equal in value that which would be required on all the claims if they were separate or independent.

The expenditures made by Miller, as stated in his notice of 1898, were not equal, by one half, to the amount required for either the year 1895 or the year 1897. Judged by his own statements, he was not a co-owner who had made the required expenditures upon the claims which were the subject of the notice, for the years with respect to which contribution was called for from Bingaman, and was not, therefore, in a position to invoke the forfeiture provisions of the statute under consideration.

Another objection to the notice of 1898 is the fact that one of the claims is erroneously described as the "Golden Cord," when reference was intended to be had to the "Golden." Undoubtedly, notices under this statute should so describe all claims intended to be affected thereby that they may be readily identified, but whether this error in this notice would in itself be fatal need not be decided.

It is unnecessary to consider what would have been the effect of said second notice, published after Miller had made entry of the claims, if payment of the cost thereof and tender of the amount called for therein had not been made as hereinbefore stated. The second notice is not relied upon here, but even if it were, the payment and tender thereunder were sufficient to prevent any forfeiture as against Bingaman by reason thereof, even if it were held to have been in all respects a legal notice, a matter as to which no opinion is intended to be here expressed.

The notice upon which the claimants under the entry rely is the one

of 1898. As that notice was fatally defective, its publication, even though for the length of time prescribed in the statute, was and is insufficient to establish a forfeiture by Bingaman of his interest in said claims, or to show title in Miller to such interest.

It follows from what has been said that Miller is not, and was not at the time of his said entry, the sole owner of the claims in controversy, and that Bingaman still retains whatever interest he had in said claims prior to the notice of 1898, in so far as that notice is concerned. The entry was erroneously allowed upon the proofs submitted. Such proofs did not show full title in Miller and for that reason should have been rejected. The relocations by Miller, in view of the statute upon which they are based, do not affect the rights of Bingaman under the original locations. The entry will therefore have to be canceled, unless Miller shall agree that the same may be amended by including therein the name of Bingaman as a co-owner with him of said claims.

As the claimants under the entry have already appeared and presented their contentions with respect to the notice of 1898, it is unnecessary that a rule be laid upon them as prayed for in the protest. You will call upon said claimants to elect whether the entry may be amended in the manner herein stated, or canceled. If they shall elect that the entry may be so amended, it will be done accordingly and approved for patent, unless other objection appears. In the event of their failure to so elect within a reasonable time after notice, the entry will be canceled.

In the absence of a decision of the matter here in controversy by a court possessing jurisdiction of the subject matter and parties no other conclusion seems possible, and the decision appealed from is reversed accordingly.

FOREST RESERVATION—PASTURING OF LIVE STOCK—PARAGRAPH 13 OF
RULES AND REGULATIONS AMENDED.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., December 23, 1901.

Paragraph 13 of the Rules and Regulations Governing Forest Reserves is hereby amended so as to read as follows:

PASTURING OF LIVE STOCK.

13. The pasturing of sheep and goats on the public lands in the forest reservations is prohibited: *Provided*, That in the States of Oregon and Washington, where the continuous moisture and abundant rain-falls of the Cascade and Pacific Coast ranges make rapid renewal of herbage and undergrowth possible, the Commissioner of the General

Land Office may, with the approval of the Secretary of the Interior, allow the limited grazing of sheep within the reserves, or parts of reserves, within said States: *And also provided*, That when it shall appear that the limited pasturage of sheep and goats in a reserve, or part of a reserve, in any State or Territory will not work an injury to the reserve, that the protection and improvement of the forests for the purpose of insuring a permanent supply of timber and the conditions favorable to a continuous water flow, and the water supply of the people will not be adversely affected by the presence of sheep and goats within the reserve, the Commissioner of the General Land Office may, with the approval of the Secretary of the Interior, also allow the limited grazing of sheep and goats within such reserve. Permission to graze sheep and goats within the reserves will be refused in all cases where such grazing is detrimental to the reserves or to the interests dependent thereon, and upon the Bull Run Forest Reserve in Oregon, and upon and in the vicinity of Crater Lake and Mount Hood, or other well known places of public resort or reservoir supply. The pasturing of live stock, other than sheep and goats, will not be prohibited in the forest reserves so long as it appears that injury is not being done the forest growth and water supply, and the rights of others are not thereby jeopardized. Owners of all live stock will be required to make application to the Commissioner of the General Land Office for permits to graze their animals within the reserves. Permits will only be granted on the express condition and agreement on the part of the applicants that they will agree to fully comply with all and singular the requirements of any law of Congress now or hereafter enacted relating to the grazing of live stock in forest reserves, and with all and singular the requirements of any rules and regulations now or hereafter adopted in pursuance of any such law of Congress; and upon failure to comply therewith the permits granted them will be revoked and the animals removed from the reserves. Permits will also be revoked for a violation of any of the terms thereof or of the terms of the applications on which based. Annual permits may be granted by the supervisor in charge of the reserve to persons living within the limits of the reserve, where the total number of cattle and horses involved in the permit does not exceed one hundred head.

BINGER HERMANN, *Commissioner*.

Approved, December 23, 1901.

E. A. HITCHCOCK,

Secretary of the Interior.

DESERT-LAND ENTRY—ASSIGNMENT—EXECUTION OF AFFIDAVIT.

ANNA I. DOOL.

The affidavit of the assignee of a desert-land entry required by the regulations must be sworn to before one of the officers of the local land office, a United States commissioner, or a judge or clerk of a court of record in the county wherein the land in question is situated; and where such affidavit is executed before an officer other than those enumerated, the assignment will not be recognized.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *December 27, 1901.* (A. S. T.)

Anna I. Dool has appealed from your office decision of May 29, 1901, declining to recognize the assignment made to her by William H. Rook, on March 4, 1901, of the desert land entry No. 1394, made by said Rook on February 27, 1901, for the S. $\frac{1}{2}$ of Sec. 7, T. 17 S., R. 14 E., Los Angeles land district, California, on the ground that the affidavit of the assignee required by the regulations was not sworn to before any officer authorized to administer oaths in such cases.

The law (26 Stat., 121) and the departmental regulations (Circular of July 11, 1899, page 42) seem to require that such affidavits shall be sworn to before one of the officers of the local land office, or before a United States commissioner, or a judge or clerk of a court of record in the county wherein the land in question is situated.

The affidavit in this case was not sworn to before either of said officers, but was sworn to before the clerk of the county court of Mercer county, Illinois, and your said decision, declining to recognize the assignment for that reason, is correct, and is affirmed.

The papers are herewith returned.

Your attention is called to the large number of desert land entries in the Los Angeles land district, California, all made on February 27, 1901, and all signed on March 4, 1901. The simultaneous making and assignment of so many desert land entries in the same district is calculated to excite suspicion as to the good faith of the entries, and your attention is called to the matter, to the end that you may consider the expediency of directing an investigation of the matter.

FOREST RESERVATION—LIEU SELECTION—ACTS OF JUNE 4, 1897, AND JUNE 6, 1900.

ARDEN L. SMITH.

The owner of lands within a forest reservation, who, acting under the act of June 4, 1897, executed and delivered to the United States a deed therefor, and prior to October 1, 1900, made application for specific tracts of unsurveyed land in lieu thereof, is excepted from the provision of the act of June 6, 1900, restricting lieu selections thereunder to surveyed land.

An application to make lieu selection under the act of June 4, 1897, should not be received during the pendency of a prior similar application for the same land; but where a second application was so received prior to October 1, 1900, and held, awaiting disposition of the prior application, until after that date, it will, upon the final rejection of such prior application, be treated as within the exception or saving clause of the act of June 6, 1900.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *December 27, 1901.* (J. R. W.)

Arden L. Smith appealed from your office decision of May 31, 1901, rejecting his selection of the SE. $\frac{1}{4}$ Sec. 8, T. 6 N., R. 3 E., W. M., unsurveyed, Vancouver, Washington, in lieu of the SE. $\frac{1}{4}$ of Sec. 2, T. 2 S., R. 5 E., W. M., in the Bull Run forest reservation, Oregon.

September 15, 1900, Smith presented his selection at the local office under the act of June 4, 1897 (30 Stat., 36), which the local officers received and held waiting final action on a similar and prior selection of the same land by C. W. Clarke. June 11, 1900, your office rejected Clarke's selection, allowing the usual time for appeal. Clarke did not appeal, and the time for him to do so having expired, the rejection by your office of his selection was formally noted upon the records of the local office January 28, 1901.

Your office decision, appealed from by Smith, held that his selection could not be accorded any effect prior to the formal notation upon the records of the local office of the rejection of Clarke's selection, and as, before that time, the act of June 6, 1900 (31 Stat., 614), had restricted lieu selections under the act of June 4, 1897, to surveyed lands, Smith's selection, which was of unsurveyed lands, would have to be rejected.

The act of June 6, 1900, declared—

that nothing herein contained shall be construed to affect the rights of those who previous to October first, nineteen hundred, shall have delivered to the United States deeds for lands within forest reservations and make application for specific tracts of lands in lieu thereof.

With both of these conditions Smith complied prior to October 1, 1900, that is, he delivered to the United States a deed for his lands within a forest reservation, and made application for a specific tract of land in lieu thereof. By the terms of the act he was thus excepted from its provision restricting lieu selections to surveyed land, unless it be true, as held by your office, that the application of Smith was of no effect while the prior selection of Clarke stood undisposed of upon the records of the local office.

The selection by Smith of land included within a prior and pending selection by Clarke should have been promptly rejected by the local officers for that reason alone. Good administration requires that not more than one selection of this character be entertained at the same time for the same land, but the matter is sufficiently within the control of the Secretary of the Interior to enable him to do justice in an excep-

tional instance like that here presented. By receiving Smith's selection and holding it to await action on the prior and pending selection of Clarke, the local officers, in effect, justified Smith in believing that if Clarke's selection should be eventually rejected Smith's selection would be recognized and given effect, if, upon examination, no other objection appeared. Had Smith's selection been promptly rejected on account of the prior and pending selection of Clarke, as ought to have been done, Smith would then have been at liberty to exercise his right of exchange under the act of June 4, 1897, upon any other vacant lands open to settlement, surveyed or unsurveyed, and if advantageous to him to do so he would probably have exercised the right upon other unsurveyed lands before October 1, 1900. Under the circumstances shown it is believed that Smith's application should be treated as within the exception or saving clause of the act of June 6, 1900, and for that reason your office decision is reversed, and the selection, if otherwise regular, will be approved.

FOREST RESERVATION—LIEU SELECTION—ACTS OF JUNE 4, 1897, AND
JUNE 6, 1900.

GARY B. PEAVEY.

The act of June 6, 1900, restricting lieu selections under the act of June 4, 1897, to surveyed lands, does not prevent the owner of lands within a forest reservation, who, acting under the act of June 4, 1897, executed and delivered to the United States a deed therefor, and, prior to October 1, 1900, made application for specific tracts of unsurveyed land in lieu thereof, but failed to file therewith, or prior to October 1, 1900, the required proofs showing the condition and character of the selected lands, from subsequently, if the condition and character of the lands then permit, perfecting his selection by supplying the requisite proofs, the right of the selector to be determined as of the date when the selection is thus completed.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *January 2, 1902.* (J. R. W.)

The Department is in receipt of your communication of August 23, 1901, transmitting, for action by the Department, the selection of Gary B. Peavey for what will be, when surveyed, the N. $\frac{1}{2}$, the SE. $\frac{1}{4}$, and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 25, T. 33 N., R. 9 E., Seattle, Washington, in lieu of the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 10, the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 15, T. 28 N., R. 13 W.; the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of Sec. 26, the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 27, and N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 9, T. 28 N., R. 14 W., Willamette Meridian, within the limits of the Olympic forest reservation, Washington, as created by executive order of February 22, 1897 (29 Stat., 901).

July 15, 1899, Peavey selected the above-named lieu lands, then unsurveyed, under the act of June 4, 1897 (30 Stat., 36). With the

selection was filed a proper non-mineral affidavit, but there was no affidavit that the lands were unoccupied.

Unsurveyed public lands having ceased, on October 1, 1900, to be subject to selection in exchange for private lands in a forest reservation relinquished to the government, the question presented is, whether the applicant may perfect the selection here under consideration by now presenting the requisite proofs showing the condition and character of the land selected. The applicant has been heard, orally and by brief.

The act of June 6, 1900 (31 Stat., 614), restricting lieu selections under the act of June 4, 1897, to surveyed lands, provides that—

nothing herein contained shall be construed to affect the rights of those who, previous to October first, nineteen hundred, shall have delivered to the United States deeds for lands within forest reservations and make application for specific tracts of land in lieu thereof.

The word "application," used in the statute, is not without significance. The word "selection" is not used, and, may be, purposely to avoid the construction that no other cases were excepted than perfected applications, that is, selections entitled to be approved and to be regarded as effective. But, apart from this, the statute names two essential conditions, upon compliance with which, prior to October 1, 1900, the rights of one making selection of unsurveyed lands should not be affected: (1) He must have delivered to the United States a deed for lands within a forest reservation; and (2) he must have made application for a specific tract of lieu land. Peavey is within both these conditions. His right to perfect his selection can be denied only by the insertion in the act of words of restriction or limitation not contained therein, such as would make it read:

nothing herein contained shall be construed to affect the rights of those who, previous to October first, nineteen hundred, shall have delivered to the United States deeds for lands within forest reservations and shall have perfected a selection, conformably to existing regulations, of specific tracts of land in lieu thereof.

In *Newhall v. Sanger* (92 U. S., 761) the court had under consideration the act of March 3, 1853 (10 Stat., 245), which excepted from pre-emption and sale "lands claimed under any foreign grant or title," and, construing the statute, held (p. 765):

This section expressly excludes from pre-emption and sale all lands claimed under any foreign grant or title. It is said this means "lawfully" claimed; but there is no authority to import a word into a statute to change its meaning.

But for the act of June 6, 1900, *supra*, restricting the right of selection to surveyed lands, Peavey would have a right now to perfect his selection of these unsurveyed lands, if they are otherwise subject to selection. The statute expressly says that if, previous to October 1, 1900, he shall have delivered to the United States a deed for his lands within the forest reservation and shall have made application for a

specific tract of lands in lieu thereof, the change in the law shall not affect his right. The right of which the act of June 6, 1900, evidently speaks is a right to carry to completion, as if that act had not been passed, an incomplete selection initiated in the manner named in the act and pending undisposed of October 1, 1900, when the prohibition against the selection of unsurveyed lands became effective. This is the right which is not to be affected. The applicant has brought himself within the conditions named in the act. His application is therefore excepted from its operation. The case is apparently one between the applicant and the government. If, therefore, the condition and character of the selected lands now permit and he perfects his selection within a reasonable time, to be fixed by your office, he is, under the statute, entitled to have the selection approved as of the time when it shall be perfected. (*Gray Eagle Oil Co. v. Clarke*, 30 L. D., 570, 581.)

The papers are herewith returned, and the case will be further considered and disposed of in conformity to this decision.

SCHOOL LAND—LEASE OF SCHOOL LAND—ACT OF JUNE 21, 1898.

TERRITORY OF NEW MEXICO.

The act of March 20, 1901, of the legislative assembly of New Mexico, amending section twelve of the territorial act of March 16, 1899, by striking out the paragraph thereof which provides that all lands to be leased under section ten of the act of Congress of June 21, 1898, shall first be appraised, is not in terms or by necessary implication retroactive; hence leases executed under said section ten while said section twelve as originally enacted was in force can not be approved without proof of the appraisal of the lands covered thereby prior to their execution.

The "lands that may be leased only" referred to in section ten of the act of June 21, 1898, embrace sections sixteen and thirty-six granted for the use of common schools, and the "lands to the extent of two townships in quantity" granted for university purposes. There is no authority in said act to sell any of these lands or the standing timber thereon.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *January 3, 1902.* (G. B. G.)

Your office communication of April 11, 1901, calls the attention of the Department to the act of June 21, 1898 (30 Stat., 484), which makes certain grants of land to the Territory of New Mexico for school and other purposes, the act of the legislative assembly of said Territory "establishing a board of public lands, assigning their duties, and for leasing and managing public lands and funds," approved March 16, 1899 (*Laws of New Mexico, 1899*, page 156), and an act of said legislative assembly, a certified copy of which is transmitted, amending

said act of March 16, 1899, approved March 20, 1901. The attention of the Department is especially directed to certain provisions of these acts relative to the leasing and sale of the lands granted the Territory for common school and university purposes, and it is requested that the jurisdiction of the Department over the "lands which may be leased only" be defined. Specifically, your office asks also to be advised whether certain leases on file in your office awaiting appraisal of the leased lands may be approved without further delay, in view of certain provisions of the act of March 20, 1901, *supra*.

In accordance with permission given by this Department, the Solicitor-General for said Territory has filed a brief on behalf of the Territory, urging that the territorial legislation be upheld, and that the Department decide that by virtue of such legislation said leases may be approved, without proof that the leased lands had been appraised prior to the execution of the leases, and that it be further held that the Territory has authority to sell the "down, mature, and large growth timber" on sections sixteen and thirty-six, granted to the Territory as school lands.

Section one of the act of June 21, 1898, *supra*, grants to the Territory of New Mexico sections sixteen and thirty-six (with certain exceptions not necessary to notice), for the support of common schools. Section 3 thereof grants "lands to the extent of two townships in quantity," and, in addition, sixty-five thousand acres, together with all saline lands, for university purposes, and grants one hundred thousand acres for the use of an agricultural college, and provides, as to the lands granted by that section:

That the proceeds of the sale of said lands, or any portion thereof, shall constitute permanent funds to be safely invested, and the income thereof to be used exclusively for the purposes of such university and agricultural college, respectively.

The lands granted by section one for the support of common schools and the "lands to the extent of two townships in quantity" granted by section 3 for university purposes, had been previously "reserved" for such purposes by sections 5 and 6 of the act of July 22, 1854 (10 Stat., 308, 309). Section 6 of said act of June 21, 1898, makes grants of lands for various objects of internal improvements. Section 10 thereof is in part as follows:

That the lands reserved for university purposes, including all saline lands, and sections sixteen and thirty-six reserved for public schools, may be leased under such laws and regulations as may be hereafter prescribed by the legislative assembly of said Territory; And it shall be unlawful to cut, remove or appropriate in any way any timber growing upon the lands leased under the provisions of this act, The remainder of the lands granted by this act, except those lands which may be leased only as above provided, may be sold under such laws and regulations as may be hereafter prescribed by the legislative assembly of said Territory; *Provided*, That such legislative assembly may provide for leasing all or any part of the lands granted in this act on the same terms and under the

same limitations prescribed above as to the lands that may be leased only, but all leases made under the provisions of this act shall be subject to the approval of the Secretary of the Interior, and all investments made or securities purchased with the proceeds of sales or leases of land provided for by this act shall be subject to like approval by the Secretary of the Interior.

The territorial act of March 16, 1899, *supra*, constitutes the Governor, Solicitor-General, and Commissioner of Public Lands of the Territory a board for the leasing, sale, general management, and control of all public lands granted to said Territory, and section 12 thereof provides "that all lands to be leased shall first be appraised by the board."

The territorial act of March 20, 1901, *supra*, amends section 12 of the act of March 16, 1899, by striking out the paragraph quoted, and by adding thereto authorization to the board "to sell the down, mature, and large growth timber on any of the sixteenth and thirty-sixth sections of said land granted as school lands," and providing specifically the manner of sale, but does not provide that these sales shall be subject to the approval or supervision of the Secretary of the Interior or any other federal officer.

Your office states that there are now pending therein a number of leases awaiting reports of appraisal before submission for approval, and requests instructions as to whether the territorial act of March 20, 1901, "obviates the necessity of requiring reports of appraisal of lands leased prior to its enactment."

In an opinion rendered by the Assistant Attorney-General for this Department, June 5, 1900 (15 Assistant Attorneys-General's Opinions, 234), it was held, in view of the provision in section 12 of the act of March 16, 1899, above cited, "that the appraisal of the lands to be leased is a necessary prerequisite to such leasing and to the approval of the lease by the Secretary of the Interior."

In this view, the leases on file in your office cannot be approved without proof of the appraisal of the leased lands before the execution of the leases. Appraisal being a necessary prerequisite to the leasing of the lands, if these lands were not appraised before the leases were executed, then the leases were invalid from the beginning, and the repeal of the law in force at the date of the execution of the leases would not make them valid. It is probably true, and may be conceded for the purposes of this opinion, that the territorial legislature might have given validity to the leases executed in violation of that provision of the act of March 16, 1899, requiring an appraisement of the land as a condition precedent to the leasing thereof, but it has not done so either in terms or by necessary implication, and the presumption of law is that such effect was not intended. There is nothing in the act of March 20, 1901, which permits an interpretation giving to it a retroactive operation or which warrants the conclusion that it was

intended to apply to other than future contracts for the leasing of these lands. In other words, the language used does not include contracts then existing for the leasing of these lands, and in the interpretation of a statute language may not be imported into it to give validity to past transactions. I have therefore to advise you that the leases on file in your office cannot be approved without proof of appraisal before they were executed.

The "lands that may be leased only" referred to in section 10 of the act of June 21, 1898, *supra*, embrace sections sixteen and thirty-six granted for the use of common schools, and the "lands to the extent of two townships in quantity" granted for university purposes. These lands are referred to in section 10 as "reserved" lands, and the word reserved as there used does not refer to a condition created by that act, but to the lands which had been previously reserved by the act of July 22, 1854, *supra*. There were no reservations of land made by the act of June 21, 1898. This act made a grant *in presenti* of lands for the support of common schools and for university purposes, among which were sections sixteen and thirty-six and the two townships which had been previously reserved. See Territory of New Mexico (29 L. D. 364).

There is no express authority given to the Territory in the granting act to sell sections sixteen and thirty-six or the two townships reserved for university purposes. These lands are there referred to as "reserved for public schools," as "reserved for university purposes," and as lands "that may be leased only," as contradistinguished from those lands granted by said act, which may be either leased or sold. The provision in section 10 making it unlawful "to cut, remove, or appropriate in any way any timber growing upon the lands leased under the provisions of this act," is inconsistent with unrestricted right of sale, whether it refers to the grantee or the lessee, or both, and can only be held to apply to such of said lands as may be "leased only." Of such are sections sixteen and thirty-six. There is no authority in the granting act to sell these sections, such sales being impliedly inhibited. It results as matter of law that there is no authority to sell the standing timber thereon, it being part of the realty, and your office is directed to notify the proper officers of the Territory that, in the opinion of this Department, so much of the territorial act of March 20, 1901, as authorizes the sale of standing timber on sections sixteen and thirty-six is in violation of the spirit of the granting act, and that it will be my duty at the proper time to call the attention of Congress to said territorial act and to recommend that it be disapproved by that body, in the exercise of the authority conferred by section 1850 of the Revised Statutes. If, in the meantime, it be brought to the attention of your office that the territorial authorities shall have taken steps to carry said act into effect, the Department

should be advised thereof, to the end that the Secretary of the Interior may exercise such authority as may be vested in him by law to prevent the cutting and removal of timber from these lands.

INDIAN LANDS—RAILROAD RIGHT OF WAY—SECTION 5, ACT OF
FEBRUARY 18, 1888.

OPINION.

The right of dissent accorded by section five of the act of February 18, 1888, from the statutory allowance to the tribe or nation provided for by said act on account of right of way granted, is limited to a dissent by the general council of either the nation or tribe named, and there is no authority for the acceptance of a dissent by the principal chief of such nation or tribe; nor is the Department of the Interior authorized to extend the time within which such dissent may be certified.

Assistant Attorney General Van Devanter to the Secretary of the Interior, January 8, 1902. (F. W. C.)

I am in receipt, by reference from the Acting Secretary under date of the 4th instant, of a letter from the Commissioner of Indian Affairs, dated December 31, last, transmitting a communication from the principal chief of the Choctaw nation in the matter of the allowance to said nation on account of the right of way granted by act of Congress approved February 18, 1888 (25 Stat., 35), to the Choctaw, Oklahoma and Gulf Railroad Company, in which letter the principal chief of said nation states that the general council will not convene before the first of October next and for that reason he assumes the right to dissent from the statutory allowance of \$50 per mile, as provided for in section 5 of said act of February 18, 1888, for that portion of the road shown upon the map of definite location approved by this Department on November 29, last. In said reference my opinion is desired as to "whether said dissent of the principal chief can be accepted as within the provisions of said section 5, and also whether said section may be construed to allow the general council, at its regular session, the right to dissent from said statutory allowance, without regard to the time when the maps of the railroad company are filed in the Department and approved."

In said section 5 of the act of February 18, 1888, it is provided:

That if the general council of either of the nations or tribes through whose lands said railway may be located shall, within four months after the filing of maps of definite location as set forth in section six of this act, dissent from the allowance hereinbefore provided for, and shall certify the same to the Secretary of the Interior, then all compensation to be paid to such dissenting nation or tribe under the provisions of this act shall be determined as provided in section three for the determination of the compensation to be paid to the individual occupant of lands, with the right of appeal to the courts upon the same terms, conditions, and requirements as therein provided.

It will be noted that the right of dissent from the statutory allowance of \$50 per mile to the nation or tribe through whose lands the said railway may be located, is limited to a dissent by the general council of either of the nations or tribes, and I am of opinion that the mere fact that such general council may not in regular course be in session within the time limited in the act for the certification of a dissent from the statutory allowance, will not authorize the acceptance of a dissent by the principal chief of such nation or tribe, nor is this Department authorized to extend the time within which such dissent may be certified.

Approved, January 8, 1902:

E. A. HITCHCOCK,

Secretary.

ABANDONED MILITARY RESERVATION—JURISDICTION—WITHDRAWAL.

ALLEN H. COX (ON RE-REVIEW).

So long as the title to public land remains in the government, the land department, and the Secretary of the Interior as the head of that department, are authorized to try and determine the rights of claimants therefor; and this power of necessity carries with it the power and involves the duty of determining whether such title remains in the government or has been granted away from it.

An authoritative order by the proper executive department of the government, directing the withdrawal of public lands from disposition, is, while in force, a bar to the appropriation of the land under the public land laws.

Withdrawals of public lands may be made for present public uses, or disposition in a special way, or in anticipation of future uses or disposal.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *January 10, 1902.* (G. B. G.)

This is a motion by Allen H. Cox, for himself and thirteen other persons, asking a review of departmental decision of October 15, 1901 (31 L. D., 114), involving certain lands in the abandoned Fort Hays military reservation, State of Kansas. Said decision referred to the acts of July 5, 1884 (23 Stat., 103), and August 23, 1894 (28 Stat., 491), providing for the disposal of abandoned military reservations, and set out certain executive orders affecting the disposal of the lands in controversy, notably the order of March 22, 1895, withdrawing the lands in said reservation "from settlement and entry," the order of June 13, 1899, vacating the order of March 22, 1895, and containing the explanatory statement that the action therein taken would open to "settlement" all of the lands in said reservation, except those covered by improvements, and the order of August 24, 1899, again withdrawing said lands from disposition under the acts mentioned. And upon a study of said acts and executive orders it was held that these lands

were open to settlement, but not to entry, between June 13, 1899, and August 24, 1899; that an application to enter said lands, presented at the local office between said dates, did not initiate a claim sufficient to except the land applied for from the grant of said reservation to the State of Kansas made by the act of March 28, 1900 (31 Stat., 52), and your office was directed to take steps in accordance with the decision to clear the record of all entries allowed of lands in the reservation resting alone upon applications presented at the local office between said dates.

This decision was rendered upon the petition of the State of Kansas asking the review of a former departmental decision herein of June 26, 1900 (30 L. D., 90), wherein it had been held that the lands within said reservation were subject to both settlement and entry between June 13, 1899, and August 24, 1899, and that the homestead application of Cox for a tract of land therein presented between said dates was the initiation of a valid claim to the land applied for, and defeated to that extent the grant to the State. Cox and his associates in the pending motion claim under homestead entries allowed pursuant to the Department's said decision of June 26, 1900.

It is urged in the pending motion that the departmental decision of October 15, 1901, was and is void for want of jurisdiction in the Department to render it, in that the decision of June 26, 1900, became final under the rules of the Department, and the State of Kansas was bound thereby; that the "departmental orders attempting to suspend the operation of the acts of July 5, 1884, and August 23, 1894," were nugatory and void, and did not withdraw said lands from the operation of said acts of Congress; and, generally, that the decision of October 15, 1901, was contrary to law and the well-established rules of the Department.

So long as the title to public land remains in the government, the land department and the Secretary of the Interior, as the head of that department, are authorized to try and determine the rights of claimants therefor, and this power of necessity carries with it the power and involves the duty of determining whether such title remains in the government or has been granted away from it. The present case arose upon the application of Cox to enter a tract of land lying within the limits of the said abandoned Fort Hays military reservation, the rejection of that application by the local officers, and the appeal of Cox therefrom.

The State of Kansas had not been heard and was not a party to the proceeding. The Department's decision of June 26, 1900, was rendered in an *ex parte* proceeding, and while that decision referred to the grant to the State made by the act of March 28, 1900, the claim of Cox might have been denied without reference to that act, because that claim rested upon a homestead application for land in reservation at the date of its presentation. A motion for review of that decision

was filed by "The Committee on F. H. M. Reservation," which was treated by the Department as the petition of the State, and denied, but the State afterwards disclaimed responsibility for said motion. Indeed, although the grant to the State had been made, it was conditioned upon the State's acceptance thereof, and the State had not yet accepted it, and could not be said in law to be a party in interest. How, then, can it be well said that the State was estopped from urging its claim to said land under the grant, or that the Department might not with propriety hear and determine the validity of that claim?

There is no force in movant's contention that the executive orders withdrawing these lands from settlement and entry were nugatory and void, in that their purpose was to suspend the operation of the acts of July 5, 1884, and August 23, 1894. Without entering into any discussion of the purpose to be subserved as contemplated by these withdrawals, it is enough to say that they were the authorized acts of the executive, and as such prevented while they were in force an appropriation of the land under the public land laws. See decisions of the Supreme Court of the United States in cases of *Wolsey v. Chapman* (101 U. S., 755); *Wood v. Beach* (156 U. S., 548); *Spencer v. McDougal* (159 U. S., 62); *Riley v. Wells* (Book 19, Lawyers' Co-operative Edition of United States Supreme Court Reports, 648). In the case last cited it was held that where the proper executive department of the government had issued an authoritative order directing the local land officers to withhold the lands there in dispute from sale, such order was, while in force, sufficient to defeat a settlement for the purpose of pre-emption, notwithstanding it was afterwards found that the law, by reason of which the action was taken, did not contemplate such a withdrawal.

And the general rule above stated holds good in instances like the present one, where the withdrawal was made in anticipation of a congressional grant of the lands withdrawn. In the case of *Hans Oleson* (28 L. D., 25, 31), it was said:

In the nomenclature of the public land laws, the word "withdrawal" is generally used to denote an order issued by the President, Secretary of the Interior, Commissioner of the General Land Office, or other proper officer, whereby public lands are withheld from sale and entry under the general land laws, in order that presently or ultimately they may be applied to some designated public use, or disposed of in some special way. Sometimes these orders are not made until there is an immediate necessity therefor, but more frequently the necessity for their making is anticipated.

It is well, too, in the present case to not lose sight of the fact that Congress impliedly gave recognition to these withdrawals by its subsequent grant of the lands involved, for the purpose anticipated in the withdrawals. The congressional action added nothing to the validity of the withdrawals, but proves the foresight and wisdom of the land department in making them, and illustrates the necessity for the existence of such authority in the executive department of the government.

Upon the general contention that the decision under review was contrary to law and the well-established rules of the Department, it will be sufficient to say that it was shown in the decision itself that the action taken was in keeping with the law, and, while it was therein admitted that the practice that had theretofore prevailed in the administration of the act of 1894, with reference to the appraisement of the land, had in the case of surveyed lands been in keeping with the contention of Cox and his associates, it was pointed out that the better practice required the appraisement of such lands before entries were allowed therefor, and, besides, that there could be no doubt of the power of the Secretary of the Interior to require such antecedent appraisements, and that the orders and correspondence relating to these lands justified the conclusion that it was the intention of the Department to have such appraisements first made.

The motion for review is denied.

SETTLEMENT—RESIDENCE—ADVERSE CLAIM.

MEYER v. NORTHERN PACIFIC RY. CO.

In order to successfully assert, as against an intervening railroad selection made under the act of March 2, 1899, a right or claim acquired by settlement upon unsurveyed land with a view to entry thereof under the homestead laws, the homestead applicant must show that he established an actual residence upon the land within a reasonable time after settlement and that such residence had been maintained to the date of the presentation of his homestead application.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *January 10, 1902.* (F. W. C.)

The Department has considered the appeal by Christian Meyer from your office decision of July 23, last, affirming the action of the local officers in rejecting his homestead application covering the SE. $\frac{1}{4}$ of Sec. 14, T. 12 N., R. 6 W., Vancouver land district, Washington, for conflict with the selection made of this land by the Northern Pacific Railway Company.

Said company made selection of the land on July 11, 1899, under the provisions of the act of March 2, 1899 (30 Stat. 993), while it was yet unsurveyed, the plat of the survey of this township not having been filed until June 7, 1900. A new selection list describing the lands according to the lines of the public survey was filed by the railway company on June 20, 1900.

On the day the plat of the township was filed in the local office (June 7, 1900), Meyer filed in that office his homestead application covering the tract here in question, in support of which he alleged settlement upon the land May 15, 1899. Said application was rejected for conflict with the pending selection by the railway company, from which

action Meyer appealed, and on July 9, 1900, your office directed the local officers to order a hearing, which was duly held, and upon the testimony adduced it was found that Meyer finished the erection of his cabin upon this land on May 15, 1899; that he had, up to the time of the hearing, slashed about three-fourths of an acre, and that he had planted a small portion of the clearing to garden stuff which did not produce a crop. With regard to his residence upon the tract it was found that from May, 1899, to the date of the hearing, he had merely made occasional visits to the land; that he had always lived at the town of Pe Ell, that he owned a team, with two horses, and a wagon, which he had kept all of the time at Pe Ell, using the same for hauling and draying; that the land in question is broken, hilly and rocky, cut up with canons; that it is generally poor farming land, its chief value consisting of the merchantable timber growing thereon, the same being valued at from \$3,500 to \$4,000.

From this testimony the local officers recommended that his application be rejected and the company's selection permitted to remain intact, which recommendation is sustained in your office decision from which Meyer has appealed to this Department.

In his appeal the finding of fact with regard to his residence and improvements upon this tract is not questioned, but it is contended that the quality of his residence subsequently to the filing of the railroad list of July 11, 1899, should not be considered in determining whether the land was on that date subject to selection by the railway company.

The act of 1899 limits selections made under that act to the public lands "to which no adverse right or claim shall have been attached or have been initiated at the time of the making of such selection."

Meyer alleges settlement upon this land about two months prior to the filing of the railroad selection list on July 11, 1899, and it is clear that said selection was, therefore, subject to the claim that might ripen under such settlement. As Meyer's claim rested upon settlement made upon unsurveyed land with a view to entry under the homestead laws, it was necessary that he should, in order that such right or claim might be successfully asserted as against an intervening claim, show that he established an actual residence upon the land within a reasonable time after settlement, and that such residence had been maintained to the date of the presentation of his homestead application in furtherance of such claims or right under the settlement, as alleged. Failing in this, it must be held that no such right or claim was initiated as served to defeat the railroad selection, in other respects regular and valid.

RAILROAD GRANT—ALTERNATE SECTIONS—ACT OF MARCH 2, 1899.

NORTHERN PACIFIC RY. CO.

The even-numbered sections alternate to those granted in aid of the construction of the Northern Pacific railroad, are not "reserved" within the meaning of that term as employed in section three of the act of March 2, 1899.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *January 17, 1902.* (F. W. C.)

Under date of April 1st last your office submitted, with the recommendation that the same be approved as the basis for patent, clear lists numbered 5 and 6, State of Oregon, and 64, State of Montana, of lands selected by the Northern Pacific Railway Company under the provisions of the act of March 2, 1899 (30 Stat., 993).

From your office letter of the 6th ultimo, it appears that a number of tracts included in said lists are parts of the even-numbered or reserved alternate sections within the primary limits of the Northern Pacific railroad land grant. The attention of the Department was not called to this fact by your office when submitting these lists originally, and the same was not considered when, on April 10th last, the lists were approved and returned to your office. Patents have not as yet, however, issued to the company for the lands included in these lists.

With your office letter of the sixth ultimo was forwarded a memorandum filed on behalf of the Northern Pacific Railway Company, in support of its claimed right to make selection under the act of 1899 of the reserved alternate sections within the primary limits of its land grant.

The third section of the act of March 2, 1899, *supra*, under which the selections in question were made, provides that upon the execution and filing with the Secretary of the Interior by the Northern Pacific Railroad Company of the proper deed releasing and conveying to the United States the lands granted to said company within the Mount Ranier National Park and the Pacific forest reserve, the said company shall be entitled to select "an equal quantity of non-mineral public lands, so classified as non-mineral at the time of actual government survey, which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection, lying within any State into or through which the railroad of said Northern Pacific Railroad Company runs, to the extent of the lands so relinquished and released to the United States."

It will be seen that the company was limited, among other things, in its selections to be made under this act, to public lands "not reserved" at the time of the making of such selections.

Are the sections alternate to others granted in aid of the construction of railroads, reserved lands within the meaning of the act of March 2, 1899, *supra*?

The early legislation with regard to these sections alternate to others granted in aid of the construction of railroads, impressed them with the character of reserved lands. The general pre-emption act of September 4, 1841 (5 Stat., 453), specifically excepted from pre-emption lands reserved to the United States alternate to other sections granted in aid of the construction of any canal, railroad or other improvement. By the act of March 3, 1853 (10 Stat., 244), the pre-emption laws, as they then existed, were extended over these alternate reserved sections of public lands along the line of railroads for the construction of which public lands had been or might thereafter be granted, by act of Congress; but that act contained a proviso declaring that, "The price to be paid shall in all cases be two dollars and fifty cents per acre or such other minimum price as is now fixed by law or may be fixed upon lands hereafter granted." The homesteader was also restricted in entry to eighty acres of these reserved alternate sections, while he might make entry of one hundred and sixty acres elsewhere. Sec. 1, act May 20, 1862 (12 Stat., 392).

The policy defined by this legislation is again recognized in section 2357 of the Revised Statutes, wherein it is provided:

That the price to be paid for alternate reserved lands along the line of railroads within limits granted by any act of Congress, shall be two dollars and fifty cents per acre.

It has been held that such lands are not subject to the ordinary indemnity provision found in most land grants made in aid of the construction of railroads.

By act of July 26, 1866 (14 Stat., 289), there was granted to the State of Kansas, for the use and benefit of the Union Pacific Railroad Company, southern branch, afterwards known as the Missouri, Kansas and Texas Railway Company, every alternate section of land, or parts thereof, designated by odd numbers, to the extent of five alternate sections per mile on each side of said road, and not exceeding in all ten sections per mile, with right of indemnity for those sections sold, granted, or to which the right of homestead or pre-emption settlement had attached at the date of the definite location of said line of road, to be selected "from the public lands of the United States nearest to the sections above specified," meaning the granted lands.

The indemnity limits of this grant overlap the primary limits of the grant made by the act of March 3, 1863 (12 Stat., 772), in aid of the construction of what was known as the Leavenworth, Lawrence and Galveston Railroad, and within said conflicting limits the Missouri, Kansas and Texas Railway Company made selection of the even-numbered sections and the patent of the United States was issued con-

veying such even-numbered sections for the use and benefit of the Missouri, Kansas and Texas Railway Company. Thereafter a suit was brought in the name of the United States to cancel and set aside said patents, which case is reported in 141 U. S., 358, 370, 371, where, in referring to these lands, it was said by the court:

Now, it is clear that the *even-numbered* sections, within the place limits of the Leavenworth road, were reserved by the act of 1863, for purposes distinctly declared by Congress, and which might be wholly defeated if the Missouri-Kansas company were permitted to take them as indemnity lands under the act of 1866. The requirement in the second section of the act of 1863, that the "reserved sections" which "remain to the United States," within ten miles on each side of the Leavenworth road, "shall not be sold for less than double minimum price of the public lands when sold," nor be subject to sale at private entry until they had been offered at public sale to the highest bidder, at or above the increased minimum price; the privilege given to actual *bona fide* settlers, under the preemption and homestead laws, to purchase *those* lands at the increased minimum price, after due proof of settlement, improvement, cultivation and occupancy; and the right accorded to settlers on such sections under the homestead laws, improving, occupying and cultivating the same, to have patents for not exceeding eighty acres each, are inconsistent with the theory that the *even-numbered* sections, so remaining to the United States, within the place limits of the Leavenworth road could be taken as *indemnity* lands for a railroad corporation.

As the natural result of the construction of the road aided would be an increase in the market value of the reserved sections remaining to the United States, within the place limits of the Leavenworth road, those sections were not left to be disposed of under the general laws relating to the public domain. But, in order that the government might get the benefit of such increased value, and thereby reimburse itself to some extent for the lands granted—the title to which vested in the State or the company upon the definite location of the line of the road, and, by relation, as of the date of the grant—the act of 1863 made special provisions in reference to those reserved sections, and thereby, and for the accomplishment of particular purposes expressly declared, segregated them from the body of the public lands of the United States. Being thus devoted to specified objects, they were reserved to the United States, and could not be selected by the State either under the act of 1863 or under that of 1866 for other and different objects. They could not be selected as indemnity lands under the act of 1863, because at the date of its passage they were reserved for the special purposes indicated in the second section of the act of 1863.

It follows that the Missouri, Kansas and Texas Railroad Company was not entitled, in virtue of the act of 1866, to have indemnity lands from the *even-numbered* sections within the *place* limits of the Leavenworth road.

The granting of lands in aid of the construction of railroads was discontinued about the year 1871, but since that time the increase in the building of railroads has been enormous, so that great portions of the public domain have been brought within closer communication with railroads than many of the lands in the place limits of the grants made in aid of the construction of railroads, some of which grants are eighty miles in width. Because of this fact said alternate sections have lost much of their early advantage of location, and since 1879 the legislation with regard to these alternate sections seems to have placed them on a footing with other unreserved public lands.

By the act of March 3, 1879 (20 Stat., 472), it was provided—

That from and after the passage of this act, the even sections within the limits of any grant of public lands to any railroad company, or to any military road company, or to any State in aid of any railroad or military road shall be opened to settlers under the homestead laws to the extent of one hundred and sixty acres to each settler.

See also act of July 1, 1879 (21 Stat., 46).

By the third section of the act of June 15, 1880 (21 Stat., 237), it was provided—

That the price of lands now subject to entry which were raised to two dollars and fifty cents per acre, and put in market prior to January, eighteen hundred and sixty-one, by reason of the grant of alternate sections for railroad purposes, is hereby reduced to one dollar and twenty-five cents per acre.

By the act of March 2, 1889 (25 Stat., 854) private sales of public lands were discontinued except in the State of Missouri, and by the act of March 3, 1891 (26 Stat., 1095) public sales of public lands were discontinued, save in exceptional instances not here material. The pre-emption and timber-culture laws were also repealed by that act. Originally the controlling purpose in disposing of the public lands was to obtain public revenue, and the several statutory provisions increasing or doubling in price the alternate reserved or retained sections within the limits of railroad and other similar land grants were enacted in furtherance of that purpose, but beginning with the enactment of the homestead law of May 20, 1862, *supra*, this purpose has been gradually and largely departed from, as shown by the legislation here recited, and there is no longer any statute which prescribes a method of disposing of such alternate reserved or retained sections which is different from that applicable to other lands, and there is no statute which sets apart or appropriates these sections for any specific or exclusive purpose. The second section of the act of March 3, 1891, *supra*, amended the act providing for the sale of desert lands, which amendment has been construed by this Department as reducing in price to \$1.25 per acre all desert lands within the limits of any railroad land grant.

Section 2455 of the Revised Statutes, as amended February 26, 1895 (28 Stat., 687) authorizes the Commissioner of the General Land Office in his discretion to order into market and sell at public auction isolated or disconnected tracts or parcels of the public domain containing less than one quarter-section, and this legislation is held by this Department to be as applicable to lands in alternate retained sections as to lands located elsewhere. Charles Tyler (26 L. D., 699).

The surveyed public lands valuable chiefly for timber or stone, whether within or without the limits of a railroad land grant, are subject to purchase at \$2.50 per acre under the acts of June 3, 1878 (20 Stat., 89), and August 4, 1892 (27 Stat., 348), but such lands are not

by reason of this "reserved" or excluded from the operation of other public land laws.

It appears therefore that the right of an individual to appropriate these alternate sections is now in no manner different from his right to appropriate other public lands. Upon what principle then can recent legislation like that of March 2, 1899, be held to treat these alternate retained sections as "reserved," in the sense of withheld from disposition under the general land laws, and thus excepted from selection under that act. The increase in price was the only cause for the reservation of these alternate sections, which, it will be seen, has been practically removed by later legislation.

In filing its relinquishment under that act the Northern Pacific Railway Company surrendered its title to granted or place lands only, supposedly of equal value to the alternate retained sections. This act was in the nature of an exchange act, and after most careful consideration of the entire matter, I am of opinion that the even-numbered sections alternate to those granted in aid of the construction of the Northern Pacific railroad, should not be considered as "reserved" within the meaning of that term, as employed in the said act of 1899.

The lists heretofore approved are herewith returned that patents may issue thereon.

NORTHERN PACIFIC RY. CO. *v.* SMITH ET AL.

Motion for review of departmental decision of December 5, 1901, 31 L. D., 151, denied by Secretary Hitchcock January 17, 1902.

PRIVATE CLAIM—SURVEY—LOS LUCEROS GRANT.

THE LAND COMPANY OF NEW MEXICO, LIMITED, ET AL.

Congress having confirmed and directed the survey of a private land grant, it is not within the province of the land department to question its integrity or validity.

If there is doubt as to the translation of the original title papers relating to a confirmed private land grant, the land department must be guided by the translation which governed the action of the surveyor-general and of Congress in the proceedings leading up to the confirmation of the grant.

Where conflicting private land grants have been confirmed by Congress, each without any reference to the other, it is the duty of the land department to follow the confirmations and survey and patent each grant, leaving to the judicial tribunals the determination of all matters of priority and superiority of right to the area in conflict.

Where the confirmatory act provides that the survey of a private land grant "shall conform to and be connected with the public surveys of the United States, . . . so far as the same can be done, consistently with land marks and boundaries specified" in the grant, and, on account of the absence of public surveys in the vicinity of the land, it appears to be impracticable to make the survey conform to and be connected with the public surveys, the same will not be required.

The cost of the survey of a private land claim shall be paid by the claimant, after the completion of the survey, but prior to the issuance of patent.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *January 17, 1902.* (J. H. F.)

This case is before the Department on appeal by The Land Company of New Mexico, Limited, its trustees and shareholders, from your office decision of May 3, 1900, whereby your prior office decision of May 29, 1894, directing a resurvey of private land claim No. 47, known as the Los Luceros, or Antoine Leroux, grant in Taos county, New Mexico, was revoked and the previous survey of said grant disapproved and rejected, it being held in the later decision that a survey of said grant was impossible by reason of uncertainty and vagueness in the description of its boundaries.

A brief history of the grant in question, together with a statement of the various actions taken by your office relative thereto, is essential to a proper understanding of the questions involved in the appeal. House Ex. Doc. No. 112, 37th Cong., 2d Sess., pp. 22-29, sets forth the history of the grant.

In 1742 Pedor Vijil de Santillana, on behalf of himself and his two nephews, Juan Bautista Vijil and Christoval Vijil, who joined with him therein, petitioned Don Gaspar Domingo de Mendoza, governor and captain-general of the Kingdom of New Mexico, for the grant of a certain tract of land called Los Luceros, in the jurisdiction of the pueblo of Taos, said tract being described in said petition as follows:

Red river being the boundary towards the north, on the east the lands of the pueblo and the mountain, on the west the bed of the river, and on the south lands of Sebastian Martinez.

August 9, 1742, Governor Mendoza issued the following decree making a grant in response to said petition:

In the town of Santa Fe, on the ninth day of the month of August, one thousand seven hundred and forty-two, I, Lieutenant Colonel Don Gaspar Domingo de Mendoza, governor and captain-general of this kingdom of New Mexico, in virtue of this petition, should and did order the senior justice of the jurisdiction of the pueblo of San Geronimo de los Taos to give him the possession by him therein asked for in the name of the King, our sovereign (God preserve him!) upon the conditions and terms required in the royal grants, and in particular that portion which refers to not working injury to third parties, requiring sufficient proof thereof, and shall be in the following manner: He shall erect his house or habitation two leagues distant, little more or less, from the pueblo of Taos, taking for the boundary on the north to the Arroyo Hondo, and two leagues in latitude shall be given him in the direction of the Del Norte river and towards the mountain to its summit. And with this understanding the possession will be given him as aforesaid, for himself, his children, and successors. I have so provided, ordered, and signed, with my attending witnesses, acting by appointment on account of the known absence of a royal or public notary, there being none in all this kingdom, and on this paper, there being no stamped paper in these parts.

DON GASPAR DOMINGO DE MENDOZA.

Note.—That the pasturing and watering places remain common.

JUAN FELIPE DE RIVERA.

Witness: MANUEL SANZ DE GARIZU.

August 12, 1742, juridical possession was given to the petitioners, the certificate of the officer who gave juridical possession containing the following:

I proceeded to give the possession granted by said governor to the above, wherefore I summoned the natives of said pueblo of Taos, who were the governor, casique, officers, and others of authority, and having made to them the measurement from the cemetery of the church of their pueblo and then given them one hundred varas besides, they stated that they were satisfied and that no injury would result to them in any manner whatsoever. I also caused the grant to Sebastian Martinez to be produced and stated that no injury would result to his lands by the grant made to the petitioners. Therefore, descending from my horse, with the three witnesses, I took each of the petitioners personally by the hand and walked with them over the tract and gave royal possession in the name of his Majesty.

May 21, 1857, in pursuance of the act of July 22, 1854 (10 Stat., 308), Antoine Leroux, on behalf of the legal representatives of the original grantees, then deceased, filed in the office of the United States surveyor-general for New Mexico the original title papers, accompanied by an application praying for the confirmation of said grant. This application sets forth that the original grantees became possessed of a piece of land by virtue of a grant made by the governor of New Mexico, under the government of Spain, on the 12th day of August, A. D. 1742—

as set forth in the original deed of grant herewith presented to which reference is hereby made for full proof that said grant was made as aforesaid as described in said deed of grant in the petition, decree and judicial possession, compared and reconciled one with the other; the said piece of land is described and bounded as follows, to wit: that their house or habitation should be built two leagues, more or less, from the pueblo of Taos, should be bounded on the north by the Arroyo Jondo (Hondo), on the west by a line running in a northerly and southerly direction, two leagues west of the house or habitation aforesaid or four leagues west of a line over one hundred varas west of the cemetery of the church of said pueblo and running parallel from north to south with the line running in the same direction on the west of said cemetery; on the east by the west line of said pueblo as above described and by the summit of the mountains on either side of the extent of said pueblo line and on the south by lands of Sebastian Martin.

It was further stated in said application that said Antoine Leroux, on behalf of the legal representatives aforesaid, claimed a perfect title to said lands by virtue of the original deed of grant aforesaid, and that—

They can not show the quantity of land claimed, except as set forth in said grant, as contained in the above known metes and bounds, nor can they furnish an accurate plat of the same as no survey has ever been made.

In his report of October 5, 1861 (Private Land Claims, New Mexico, Vol. 2, p. 943), the surveyor-general considered the claim thus presented and recommended that the grant be confirmed, and such report having subsequently been laid before Congress, said grant, with others,

was confirmed by act of March 3, 1869 (15 Stat., 342), it being therein directed—

that the Commissioner of the General Land Office shall, without unreasonable delay, cause the lands embraced in said several claims to be surveyed and platted at the proper expense of the claimants thereof, and upon the filing of said surveys and plats in his office, he shall issue patents for said lands.

In pursuance of this statutory direction, deputy surveyors Sawyer and McElroy, in 1877, surveyed and platted what they reported to be the land embraced in said grant, which survey was approved by Surveyor-General Atkinson, June 5, 1877. The tract so surveyed contains an area of 126,024.53 acres, and, from the Arroyo Hondo on the north, extends south a distance of about 25 miles to what is known as the Las Trampas grant, the northern boundary of which is formed by the extension eastward of the north line of a confirmed Sebastian Martin grant which lies several leagues south of the pueblo of Taos and immediately west of the Las Trampas grant and which practically touches, at its northeast corner, the southwest corner of the tract so surveyed. The eastern boundary of the tract so surveyed was established by a line running north and south parallel with the west line of the pueblo of Taos and distant west therefrom 100 varas, and distant from the center, or church of said pueblo, one league and 100 varas, the lands of said pueblo of Taos being two leagues (5.266 miles) square; and the west boundary of the tract so surveyed was established by a line running north and south parallel with the east line thereof and distant west therefrom three leagues.

This survey having been objected to by the claimants because the eastern boundary was not established at the summit of the mountain range, and other parties claiming lands embraced thereby having protested against its approval, the surveyor-general was directed to make further investigation. As a result of different investigations and hearings the then surveyor-general in 1888 reported that the survey was fraudulent and recommended its rejection and the restoration to the public domain of all the land included therein except that included in other valid claims.

By decision of May 29, 1894, your office rejected said survey and ordered a new one, holding the boundaries to be: On the north, the Arroyo Hondo; on the west, the Del Norte; on the east, the summit of the mountain range; and on the south, a line running east and west two leagues south of the Arroyo Hondo, the south line to be straight but run in such manner as to give the claimants the same amount of land they would get if it were located exactly parallel with said stream. That survey not having been made, the attorneys for claimants suggested, in 1899, that the main stream of the Arroyo Hondo should be followed, so far as its course would answer the call, and from there the north boundary should be a straight line to the summit of the

mountains; that the southern boundary should be made to conform to the course of the Arroyo Hondo; and that claimants should not be made to pay the costs of survey until the same is completed.

Upon again considering the matter, your office, by the decision from which the appeal herein was perfected, revoked its former decision of May 29, 1894, rejected the survey of 1877 and held, after seemingly questioning the integrity of the original grant and title papers, that the land conveyed by the grant cannot be ascertained or surveyed by reason of uncertainty and vagueness in the description thereof.

Congress having confirmed the grant and directed its survey, it is evidently not within the province of either your office or the Department to now question its integrity or validity. *Tameling v. U. S. Freehold Co.*, 93 U. S., 644, 662; *Maxwell Land Grant Case*, 121 U. S., 325, 369; *Astiazaran v. Santa Rita Mining Co.*, 148 U. S., 80, 82; *United States v. Conway*, 175 U. S., 60, 69. There also follows a strong presumption that the land embraced in the grant as confirmed is susceptible of definite location, and in attempting to carry out the intent of the confirmatory act the language of the granting decree, descriptive of the lands conveyed, should be construed, if possible, in such manner as will give force and effect to the grant as confirmed and certainty to its boundaries.

By the confirmatory act it is provided that private land claim No. 47, and others in the Territory of New Mexico, the numbers of which are given "as known and designated by the numbers aforesaid in the reports of the surveyor-general of the said Territory and on the books of the Commissioner of the General Land Office," be, and the same are hereby, confirmed. The documents constituting claim No. 47, as then known and designated on the books of the General Land Office and in the report of the surveyor-general, as well as in all the proceedings had thereon before Congress, embraced the original title papers hereinbefore referred to, an English translation thereof made by the official translator in the surveyor-general's office—the pertinent portions of which have hereinbefore been quoted—the report of the surveyor-general, and claimant's application for confirmation, accompanied by brief of counsel.

The surveyor-general in his report did not describe the granted land by metes and bounds, but referred to the "original papers filed," and stated that "the papers constituting the claim appear to be genuine and complete, and the grant, in all respects, to be a valid one."

The record discloses that the Arroyo Hondo has its source in the Rocky mountains northeast of the pueblo of Taos, flows in a general westerly course, and empties into the Del Norte, its nearest approach to the said pueblo lands being about two leagues from the northern boundary thereof; the Del Norte river, from the junction with the Arroyo Hondo, flows in a southerly direction, and is distant west from

the western boundary of the pueblo of Taos about three leagues; the main chain or range of the mountains extends north and south practically parallel with the Del Norte river, the base or foot hills being immediately east of the pueblo and adjoining or crossing the eastern portion of the lands of the pueblo, and the summit being some leagues farther to the east. It will be noted that, although the original petition asked for the "Red river" as the northern boundary, the granting decree expressly fixed as such boundary the "Arroyo Hondo," which is about twelve miles south of the Red river, and that, although the petition designated "the lands of the pueblo and the mountain" as the eastern boundary, the granting decree specifically declared that the grant should extend "towards the mountain to its summit." Thus, both the northern and eastern boundaries of the grant are, in the granting decree, plainly designated by easily ascertained and well defined natural objects. The only contention which arises as to the location of the grant relates to its western and southern boundaries. The original petition designated the "bed of the river" as the western boundary and the "lands of Sebastian Martinez" as the southern boundary. The only river which can be reasonably claimed to answer the description of the western boundary, as designated in the petition, is the Del Norte river. It is doubtful whether the lands embraced in the confirmed Sebastian Martin grant, hereinbefore mentioned, are those referred to in this petition as constituting the southern boundary. This confirmed Sebastian Martin grant was distant several leagues in a southwesterly direction from the Pueblo of Taos, and between them but touching the confirmed Martin grant was the Pueblo of Picuris, with its two leagues square of lands so situate as to necessarily become a part of the southern and eastern boundaries of the grant petitioned for, if it should extend that far in a southerly direction. The ceremony whereby juridical possession was given to the petitioners occurred in the immediate vicinity of the pueblo of Taos on the third day after the decree was signed and the certificate of the senior justice, as hereinbefore shown, shows that the rights of the inhabitants of the pueblo of Taos and of Sebastian Martin were considered, and that it was stated that no injury would result to them by the grant made to the petitioners, but no mention whatever was made of the pueblo of Picuris, and there was no declaration of an intent to protect its inhabitants in their possessions. Moreover, the evidence taken at the hearings hereinbefore referred to tends to show that Sebastian Martin also claimed lands between the pueblo of Taos and the Del Norte river under a grant said to have originated in 1702, and to have been recognized as late as the date of the Los Luceros grant. These were more probably the lands designated in the petition as constituting the southern boundary, but in the view hereinafter taken that matter becomes immaterial.

The decree making the grant under consideration directed the senior

justice of the jurisdiction of the pueblo of Taos to give to the petitioner, "in virtue of this petition . . . , the possession by him therein asked for," upon certain conditions and terms, one of which concerned the location of his house, and was: "He shall erect his house or habitation two leagues distant, little more or less, from the pueblo of Taos," and another of which concerned the boundaries of the granted lands, and was: "taking for the boundary on the north to the Arroyo Hondo, and two leagues in latitude shall be given him in the direction of the Del Norte river and towards the mountain to its summit." The decree then concluded: "And with this understanding the possession will be given him as aforesaid, for himself, his children and successors." The decree having departed from the petition and fixed the eastern boundary of the grant at the summit of the mountains some leagues east of the eastern boundary of the lands of the pueblo of Taos, the lands of Sebastian Martin, which were west of the western boundary of that pueblo (and this is true of both Sebastian Martin tracts) could not constitute any considerable portion of the southern boundary of the lands granted. The change in the eastern boundary, therefore, rendered it necessary that the granting decree should also designate a new southern boundary. This was done, after fixing the northern boundary at the Arroyo Hondo, by specifying in the decree that "two leagues in latitude shall be given him in the direction of the Del Norte river [which was to the west] and towards the mountain to its summit [which was to the east]." In other words, the petitioner was to have a tract of land, on the south side of the Arroyo Hondo, two leagues in latitude or width, and extending the entire length of the grant to the summit of the mountain on the east.

The bed of the Del Norte river was designated in the petition as the western boundary, and the grant or donation therein asked for was made "upon the conditions and terms" named in the decree. From this it seems to necessarily follow that, except as otherwise stated in the decree, the boundaries named in the petition were adopted and are controlling. As before shown, the decree expressly changed the northern, eastern, and southern boundaries, but the only reference in the decree to the western boundary is in the declaration made, after fixing the Arroyo Hondo as the northern boundary, that "two leagues in latitude shall be given him in the direction of the Del Norte river and towards the mountain to its summit." This is not, in itself, the naming of a specific western boundary, such as would supersede that named in the petition, but is more probably the manner in which reference was had to a boundary already fixed and which it was not intended to change. The decree, in unmistakable terms, named the northern and eastern boundaries, then gave the width of the grant, and pointed the reader to the western boundary named in the petition, which is the bed of the Del Norte river. A controlling reason for this construc-

tion of the title papers evidencing this grant is the fact that no other view or theory gives certainty to all of the boundaries of the grant.

That this is the true meaning of the language used in the granting decree becomes more obvious when it is noted that the primary meaning of the Spanish word "latitud" is breadth or width, and that the English word "latitude" is likewise primarily defined to mean "extent from side to side, or distance sidewise from a given point or line; breadth; width."

In 1894 your office obtained from the Department of State a literal translation of the original title papers, which is not the same as the liberal translation made by the official translator in the surveyor-general's office, which was before Congress at the date of the passage of the act confirming said grant. It may be that there is no material difference in these translations, but without inquiring into that it is sufficient to say that, if there is doubt as to how the original title papers should be translated, the land department must be guided by the official translation which governed the action of the surveyor-general and of Congress in the proceedings leading up to the confirmation of the grant.

In executing the survey of 1877 and in some subsequent investigations made by the surveyor-general's office, the requirement of the granting decree, that the petitioner should erect his house "two leagues distant, little more or less, from the pueblo of Taos," was regarded as a boundary call, and it seems to have been thought that the extent of the grant westward should be determined by measuring in the direction of the Del Norte river, a distance of two leagues from the point where the house was or should have been built. But if the house was ever built, all trace of the actual site had disappeared long prior to the confirmation of the grant, and the contemplated site of the house is equally impossible of location, for the obvious reason that this point was not designated in the granting decree, or in the certificate of the officer who gave juridical possession. Of course it was necessarily implied that the petitioner was to build his house within the exterior limits of the grant, but within those limits he was at liberty to erect his house at any point distant from the pueblo two leagues, little more or less. To regard the requirement as to the location of the house as a boundary call is tantamount to holding that it was left to the grantee to fix at least the western boundary and thereby the quantum of the grant. This is altogether improbable, as well as contrary to the usual terms of land grants. Again, to accept this view would be to hold that no southern boundary of the grant had been designated. True, the lands of Sebastian Martin were designated in the petition as the southern boundary, but the decree departing from the petition placed the eastern boundary so much farther to the east

that the southern boundary fixed by the petition was rendered wholly inadequate. The construction referred to seems untenable.

The Department is of opinion that the true boundary calls of this grant are susceptible of certain location, and that, as hereinbefore indicated, the limits of the grant are properly defined as follows: On the north by the Arroyo Hondo; on the east by the summit of the main chain or range of the Rocky mountains; on the south by a line extending from the summit of the main chain or range of the Rocky mountains to the Del Norte river, established at a distance of two leagues, right angle measurement, from the Arroyo Hondo and parallel to the general course thereof, said line to be run between stations fixed at such points as will make its course conform to every material change in the course of the Arroyo Hondo; on the west by the bed of the Del Norte river.

The grant, as thus defined, embraces within its limits a portion of another grant—the Lucero de Godoi—and may possibly embrace a small fraction of the Pueblo of Taos lands, on both of which grants patents have heretofore been issued. The Godoi grant was not confirmed or patented until long after confirmation of the grant in question, but the Taos grant was both confirmed and patented before that time, and as shown in the title papers hereinbefore referred to, was accorded priority over this grant. The superiority of the Taos title is admitted by the Los Luceros claimants, and is obvious. The Los Luceros and Godoi grants were both confirmed, each without any reference to the other, and thereupon the duty devolved upon this Department of following the confirmations and surveying and patenting each grant, leaving to the judicial tribunals the determination of all matters of priority and superiority of right to the area in conflict. The patent issued for the Godoi grant contains express provisions saving to other claimants any and all adverse rights acquired to lands covered thereby. That patent, as well as the act confirming the Los Luceros grant, in legal effect, only operates as a quit-claim or relinquishment of title by the United States. In order that no prejudice may result, the lands patented to the Pueblo of Taos will be excluded, and those within the conflicting limits of the Los Luceros and Godoi grants will be included in the survey of the grant under discussion.

It is claimed by appellant's attorney that the branch of Arroyo Hondo diverging to the northeast is the main branch and the one to which the name Arroyo Hondo is usually applied, and that in making the survey this branch should be followed as far as it makes an easterly progress, and from that point the north line of the grant should be run east to the summit of the mountains. It appears from a tracing transmitted by the surveyor-general that neither the north nor south branch extends eastward to the summit of the mountain range, but that the middle branch apparently intersects the summit and runs in a general westerly direction on about the same course the stream

takes after the confluence of all the branches. It is apparent that this middle branch complies most closely with the north boundary call of said grant, and it should be followed in the execution of the survey.

The surveyor-general suggests that on account of the difficulty and expense that would be met in attempting to make the survey conform to the public surveys and in connecting the same therewith, such requirements be waived. Section 3 of the confirmatory act, *supra*, provides:

That all surveys authorized by this act shall conform to and be connected with the public surveys of the United States in said Territories, so far as the same can be done, consistently with land marks and boundaries specified in the several grants upon which said claims are founded.

The foregoing statutory provision makes the execution of the requirement therein contained dependent upon the conditions existing relative to the land to be surveyed, and, in view of the statements made by the surveyor-general relative to the land in question and on account of the absence of public surveys in the vicinity thereof, it would appear to be impracticable to make the survey of said grant conform to and be connected with the public surveys, and the same will not be required.

As to the question of the costs of such survey, said confirmatory act further provides that the lands embraced in said several claims therein mentioned shall be surveyed and platted "at the proper expense of the claimants thereof."

By the general appropriation act of July 31, 1876 (19 Stat., 121), it was provided:

That an accurate account shall be kept by each surveyor-general of the cost of surveying and platting every private land claim, to be reported to the General Land Office with the map of such claim; and that a patent shall not issue, nor shall any copy of any such survey be furnished, for any such private claim until the cost of survey and platting shall have been paid into the Treasury of the United States by the parties in interest in said grant or by any other party.

The act of March 3, 1885 (23 Stat., 478, 499), contains the following:

That hereafter in all cases of the survey of private land claims the cost of the same should be refunded to the Treasury by the owner before the delivery of the patent.

These acts contemplate that the cost of survey shall be paid by claimant after survey, and therefore after the amount is ascertained, but before issuance of patent.

Your office decision of May 3, 1900, is reversed, and it is directed that a survey of said grant be made in accordance with the views herein expressed.

SCHOOL LAND—AUTHORITY OF LOCAL OFFICERS.

INSTRUCTIONS.

The character of school sections in California, whether mineral or non-mineral, is not to be wholly determined by the surveyor-general's return, nor is such return considered as very high or persuasive evidence of the character of the lands when it is once drawn in question.

The local officers may properly give such information as is shown by the records of their office, as to whether a given school section has been returned as mineral or non-mineral, or whether any portion thereof is or is not included in a homestead or other entry, etc., but it is not competent or proper for them to undertake to state, in a manner which may be erroneously accepted as a certification or authorized statement, that such section has or has not passed to the state.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *January 20, 1902.*

I have your letter of the 17th inst., enclosing a report by the register of the United States land office at Redding, California, dated the 9th instant, in response to departmental letter of December 26, 1901, relative to the suit of Wetzel v. Register and Receiver, involving section 16, township 45 N., range 7 west, Mount Diablo Meridian, California, pending in the circuit court of the United States for the Northern District of California.

The departmental letter in question also called for a report from your office as to what, if anything, is shown by the records of your office respecting the alleged certification to the State of California of this section by the register of the local office. Your office letter of the 17th instant does not make any response to this part of the departmental letter, and one is now requested.

The register's report of the 9th instant says:

I find noted upon the tract book these words: "Certified to the State per J. W. Garden, Register, Oct. 8, 1885." Our tract books are filled with notations of this kind or similar notations relating to secs. 16 and 36, and I presume that it was the practice of former registers, as it is now, to certify to the State upon inquiry by the State Surveyor General the status of the lands in secs. 16 and 36 as shown by the records.

It is apparent by this statement of the register that neither his predecessors nor he has comprehended the nature of their duties respecting these school sections. No such notation as is here indicated should have been made, and no such certificate whatever it may be should have been issued. The character of school sections in California as to whether mineral or non-mineral is not to be wholly determined by the surveyor-general's return, nor indeed is his return considered as a very high or persuasive evidence of the character of the lands when it is once drawn in question. See *Barden v. Northern Pacific R. R. Co.* (154 U. S., 288, 320); *Lindley on Mines*, Secs. 106 and 689;

Winscott v. Northern Pacific R. R. Co. (17 L. D., 274, 276); Aspen Consolidated Mining Co. v. Williams (27 L. D., 1, 21); Magruder v. Oregon and California R. R. Co. (28 L. D., 174, 177). It is also possible that lands in a school section might be excepted from a grant to a State because of other things than their mineral character, which would not necessarily be shown upon the records of the local office.

While it is competent and proper for the local officers, in response to legitimate inquiries, to give such information as is shown by the records of their office, as, for instance, whether a given section 16 has been returned as mineral or non-mineral, or whether any portion thereof is or is not included in a homestead or other entry, it is not competent or proper that these officers should also undertake to state in a manner which may be erroneously accepted as a certification or authorized statement that the section has or has not passed to the State.

Your office will transmit to the register of the Redding office a copy of this letter, and, if it seems necessary, will see that the other local offices in California are properly informed upon this question.

FOREST RESERVATION—LIEU SELECTION—CHANGE OF SELECTION.

HENRY C. MALLORY.

An application to correct or change a lieu selection under the act of June 4, 1897, should be accompanied by evidence showing whether or not the selector has transferred, assigned or encumbered the land first selected, or contracted so to do, whether any conveyance or instrument affecting or attempting to affect the title to such land, or the selector's right under the selection, is shown upon the records in the county or other office where such records are usually kept under the laws of the State or Territory where the land is situate, and as to whether, since its selection, such land has undergone any change in character or value by the cutting or removal of timber or the removal of any mineral or other thing of value.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *January 20, 1902.* (J. R. W.)

Henry C. Mallory appealed from your office decision of August 7, 1901, rejecting his application to correct and change his selection, under the act of June 4, 1897 (30 Stat., 36), from the SW. $\frac{1}{4}$ of Sec. 34, T. 40 N., R. 5 E., M. D. M., Redding, California, to the SW. $\frac{1}{4}$ Sec. 34, T. 40 N., R. 6 E., M. D. M., Susanville, California.

May 13, 1900, C. E. Glover, as attorney in fact for Henry C. Mallory, applied to select the SW. $\frac{1}{4}$ of Sec. 34, T. 40 N., R. 5 E., Redding, California, in lieu of the E. $\frac{1}{2}$ SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 5, and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ Sec. 8, T. 10 N., R. 28 W., S. B. M., in the Pine Mountain and Zaca Lake forest reservation.

August 3, 1900, Glover filed in the Redding office, and August 6, 1900, filed in the Susanville office, his affidavit and application for

change of the selection from the land so first selected to the SW. $\frac{1}{4}$ Sec. 34, T. 40 N., R. 6 E. The grounds therefor are stated in the affidavit of Glover, that:

I am legally authorized attorney for Henry C. Mallory, and that acting for him I made an application under the act of June 4, 1897, to select the SW. $\frac{1}{4}$ of Section 34, in Township 40 North, Range 5 East, Mount Diablo Meridian, in the United States land office at Redding, California; that said application was inadvertently made, the intention being to select a tract bearing the same description in Township 40 North, Range 6 E., in the United States land office at Susanville, California.

It refers to the filing of his power of attorney and the conveyance of the relinquished land assigned as base for the selection, and asks that—

my application herewith for the SW. $\frac{1}{4}$ 34, in Township 40 North, Range 6 East, be filed, and that one for the SW. $\frac{1}{4}$ of Section 34 in Township 40 North, Range 5 East, be rejected.

Your office rejected the application for the change of selection, holding, in substance, that the showing made was insufficient to warrant such action, and called attention to the regulations in the general circular of July 11, 1899, p. 136, governing applications for a "change of entry." The regulations thus cited, while not contemplating such cases as this, may be properly taken as constituting in part a guide in the matter of the showing that should be made before allowing an application like that herein.

The applicant assigns error in your office decision in failing to find that a sufficient showing has been made, and error in the local (Susanville) office in not noting on their record the application to amend, so that it would operate as notice to third parties.

It is not claimed that the error was due to any act of the local office or of any one but the selector or his attorney in fact. The applicant to amend being himself alone in fault and asking grace of the Department was bound to show a *prima facie* meritorious case before he could ask that a second tract of land should be segregated and withdrawn from appropriation by other parties. This he did not do. The showing in such a case should, among other things, include a clear statement as to whether the selector has transferred, assigned, or encumbered the land first selected, or has contracted so to do, as to whether any conveyance or instrument affecting or attempting to affect the title to such land or the selector's right under the selection is shown upon the records in the county or other office where such records are usually kept under the laws of the State or Territory where the land is situate, and as to whether since its selection such land has undergone any change in character or value by the cutting or removal of timber or the removal of any mineral or other thing of value.

As modified your office decision is affirmed.

FOREST RESERVATION—LIEU SELECTION—ACT OF JUNE 4, 1897.

CALIFORNIA AND OREGON LAND COMPANY.

Lands claimed under the grant to the State of Oregon by the act of July 2, 1864, to aid in the construction of a military road, for which no patent has issued, nor any legal equivalent thereof, are not a sufficient basis for an exchange under the act of June 4, 1897.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *January 24, 1902.* (J. R. W.)

The California and Oregon Land Company appealed from your office decision of August 17, 1901, rejecting its selection, under the act of June 4, 1897 (30 Stat., 36), for the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and E. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 32, T. 37 S., R. 26 E., W. M., Lake View, Oregon (one hundred and sixty acres), in lieu of the unsurveyed NW. $\frac{1}{4}$ of Sec. 25, T. 24 S., R. 5 E., W. M. (containing one hundred and sixty acres), in Cascade Range forest reserve, Oregon, covered by a deed to the United States by the California and Oregon Land Company, executed August 7, recorded August 10, and filed in the local office, with the selection, August 14, 1899.

The land offered as a base is in an odd-numbered section within the three-mile limits of the grant of July 2, 1864 (13 Stat., 355), to the State of Oregon to aid the construction of a military road. The chain of title from the State to the relinquisher, as shown in the abstract and certificate of the county clerk, is that, December 22, 1877, and June 25, 1889, the State of Oregon conveyed to the Oregon Central Military Road Company—

all the lands lying and being in the State of Oregon, granted or intended to be granted to the State of Oregon by act of Congress approved July 2, 1864, and subsequent acts of Congress, or of the Legislature of Oregon, approved October 26, 1864; . . . also any interest therein any of the grantors in either of said deeds might thereafter acquire, excepting out however lands sold prior to May 12, 1874, by the Oregon Central Military Road Company, not exceeding 7,000 acres.

Your office decision rejected the selection, because, under instructions of March 9, 1900 (29 L. D., 594), the title of the relinquisher being inchoate merely and still under administration, it can not be told that the particular lands relinquished passed by the grant.

The act of July 2, 1864, *supra*, excepted from the grant "any and all lands heretofore reserved to the United States by act of Congress, or other competent authority."

Indemnity provisions were made by the act of December 26, 1866 (14 Stat., 374), for any deficiencies that might be found in the adjustment of the grant; and by the act of June 18, 1874 (18 Stat., 80), the issuance of patent was directed when title to the granted lands should be earned.

Two general classes of persons who may avail themselves of the exchange provisions of the act of June 4, 1897, are provided for therein: (1) Those holding unperfected *bona fide* claims, within the boundaries of forest reserves; and (2) those holding lands within such boundaries under a patent or its equivalent; and it is urged, on appeal, that this application is within the second class, for the reason that the grant of 1864 was one *in praesenti*, passing title, as of its date, to the lands within the granted limits.

This contention, however, can not be accepted as sound. The statute is explicit: the land must be held under a "patent." True, under the departmental interpretation placed on the word "patent," it has been held to embrace its "full legal equivalent." But in this case no patent has issued, nor any equivalent thereof; nor is it yet known whether any patent ever will issue for this land under said grant. It is unsurveyed land, and while in that state it can not be known whether or not it is free from all of the exceptions imposed by the granting act and the amendatory act of 1866. Not until it has been found and adjudicated by the Department, that this tract did pass under said grant, will a patent issue therefor, and not until then will said tract afford a basis for an exchange under the act of 1897.

The decision of your office is therefore affirmed.

SOLDIERS' ADDITIONAL HOMESTEAD—ASSIGNMENT—ACT OF AUGUST 18, 1894.

JOHN H. HOWELL.

A duplicate certificate of soldiers' additional right, regularly issued, which does not indicate that it is a duplicate, purchased in good faith before the right had been exhausted, and in the hands of a *bona fide* purchaser, unsatisfied, at the time of the passage of the act of August 18, 1894, was by that act validated and made a certified right, which could thereafter be lawfully transferred, irrespective of the transferee's knowledge that the soldier's additional right had, prior to his purchase of the duplicate, been exercised through the use of the original certificate.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *January 31, 1902.* (A. S. T.)

John H. Howell has appealed from your office decision of July 15, 1901, rejecting his application for recertification of the soldiers' additional right of entry issued in the name of Alexander Allison, Sr., on April 6, 1881, for eighty acres.

It appears from your said decision that the records of your office show—

that Alexander Allison, Sr., made H. E. No. 7411, March 24, 1870, at Boonville, Mo., for E. $\frac{1}{2}$ lots 1 and 2 of NE. $\frac{1}{4}$, Sec. 3, T. 39 N., R. 21 W., containing 80 acres, on which F. C. 1404 issued February 20, 1874, and patent May 1, 1874.

Messrs. Gilmore and Co., of this city, on August 30, 1878, made application for the issuance of a certificate of right, and such certificate was issued October 17, 1878, in the name of Alexander Allison, Sr., certifying his right to make additional entry for 80 acres, and it was mailed to said attorneys.

A duplicate certificate was issued in the name of Alexander Allison, Sr., April 6, 1881, on what was considered satisfactory proof of the loss of the original certificate.

Subsequent thereto, on Dec. 12, 1900 (1890), the original certificate of right was located at the local office at Vancouver, Washington, in the name of Alexander Allison, Sr., H. E. 7468, F. C. No. 2209, for W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 34, T. 14 N., R. 9 W., containing eighty acres, being made thereunder.

By letter "C" of January 24, 1892, it was held by this [your] office that the location of said original certificate exhausted the soldier's additional right, and all local officers throughout the country were directed to seize said duplicate certificate, if presented for location, and transmit it to this [your] office without further action on their part.

On July 13, 1899, the duplicate certificate was filed in your office, with an application for its recertification in the name of H. D. Campbell, who claimed to be a *bona fide* purchaser thereof; but this application was denied by your office on October 28, 1899, on the ground that Campbell was not a *bona fide* purchaser, and on the further ground that the law did not authorize the recertification of a duplicate certificate after the original certificate had been satisfied and the soldier had thereby secured all the homestead rights to which he was entitled.

Howell, with his application, files his affidavit alleging that he purchased said certificate from H. D. Campbell for a valuable consideration on June 7, 1901; also a bill of sale of that date from said Campbell conveying to John H. Howell, for a valuable consideration, all of his (Campbell's) right, title, and interest in said certificate. He also filed the affidavit of Campbell, wherein it is alleged that he (Campbell) purchased said certificate in good faith and for a valuable consideration, from Julius Ordway, of Portland, Oregon, in June, 1899. Also the affidavit of said Ordway, alleging that he purchased said certificate about February 24, 1882, from W. C. Hill, in good faith, for a valuable consideration, and without any knowledge of any fraud or irregularity in the same; and that he sold it to Campbell in June, 1899.

Your said decision holds that, inasmuch as said certificate was declared invalid on January 24, 1892, which fact was known to Howell when he purchased the certificate, therefore "he cannot be regarded as an innocent purchaser," and on that ground you denied his application.

By the act of Congress, approved August 18, 1894 (28 Stat., 397), it is provided:

That all soldiers' additional homestead certificates heretofore issued under the rules and regulations of the General Land Office, under section twenty-three hundred and six of the Revised Statutes of the United States, or in pursuance of the decisions or instructions of the Secretary of the Interior of date March tenth, eighteen hundred and seventy-seven, or any subsequent decisions or instructions of the Secretary of the Interior, or the Commissioner of the General Land Office, shall be, and are hereby, declared to be valid, notwithstanding any attempted sale or transfer

thereof; and where such certificates have been, or may hereafter be sold or transferred, such sale or transfer shall not be regarded as invalidating the right, but the same shall be good and valid in the hands of *bona fide* purchasers for value; and all entries heretofore or hereafter made with such certificates by such purchasers shall be approved, and patent shall issue in the name of the assignees.

The only question to be determined in this case is whether or not Howell is a *bona fide* purchaser of the certificate in question within the meaning of the act above quoted.

In the case of John M. Rankin (21 L. D., 404), which is cited and relied upon by the applicant in this case, it was held that one who purchased in good faith a certificate of a soldier's additional homestead right, which had been issued by mistake, a certificate of the soldier's additional right having already been issued, but its issuance not noted on the records of the General Land Office, was entitled to have the certificate, so purchased and held by him, recertified in his own name, and that he would be held to be "a *bona fide* purchaser who bought without notice of illegality of the certificate at its inception, or of its invalidity for any other reason."

In the case of John H. Howell (24 L. D., 35), which also is cited and relied upon in the present case, it was held that the *bona fide* purchaser of a certificate of a soldier's additional homestead right was entitled to recertification of the same in his own name, notwithstanding he knew that a prior transferee of the same had invoked the provisions of the act of June 15, 1880 (21 Stat., 237), because of a defect in the transfer of the certificate to him. But in the case of John M. Rankin (28 L. D., 204), it was held that where the holder of such a certificate chose to avail himself of the right to purchase the land under the act of June 15, 1880, *supra*, the right evidenced by the certificate was thereby exhausted and the certificate satisfied, and that one who afterward purchased the certificate, with knowledge of such facts, took nothing by his purchase; and that decision overruled the decision in the case of John H. Howell, *supra*, in so far as it held that such certificates were not satisfied by the purchase of lands under the act of June 15, 1880, *supra*. But it was therein held that:

If the certificate was not satisfied, and the right therein certified exhausted before the passage of the act of August 18, 1894, that act made the certificate and certified right a claim in her [the then *bona fide* holder's] hands which she could lawfully sell, and which Rankin could lawfully buy, irrespective of his knowledge of the element of irregularity of invalidity in the original issuance of the certificate.

There is filed with the certificate in question a power of attorney, executed by Allison and his wife, in blank, on March 21, 1881, authorizing — as their attorney in fact to sell and receive the proceeds of any lands that might be entered by said Allison by virtue of said additional right, and Allison was paid \$100.00 for the same.

There is nothing connected with said certificate showing that it is a

duplicate, or that any other certificate of said right had ever been issued.

At the time Ordway purchased the certificate in question, Allison had not exhausted the right; that certificate had been regularly issued under a decision of the Commissioner of the General Land Office; there was nothing to show that it was a duplicate or that there was any other certificate outstanding for the same right. Ordway purchased it in good faith and held it at the time of the passage of the act of August 18, 1894.

It appears, therefore, that at the time of the passage of the said act of August 18, 1894, the certificate in question was in the hands of a *bona fide* purchaser, and was unsatisfied (either by location or under the act of June 15, 1880). It must be held, therefore, that the act of August 18, 1894, *supra*, gave it validity and made it a certified right—a claim in his hands which he could lawfully sell and which Campbell or Howell “could lawfully buy, irrespective of his knowledge of the element of irregularity or invalidity in the original issuance of the certificate.”

The result is that your said decision is reversed, and you are directed to recertify said additional right to said Howell.

RAILROAD GRANT—ACT OF JULY 2, 1864—JOINT RESOLUTION OF MAY 31, 1870.

INSTRUCTIONS.

Directions given that all action affecting lands within the conflicting limits of the grant made by the act of July 2, 1864, to the Northern Pacific Railroad Company, and the grant made to the same company by the joint resolution of May 31, 1870, be suspended until further directions in the matter.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *January 31, 1902.*

I am in receipt of the following communication from the Attorney General dated the 29th inst.:

- For your information, I have to state that, by direction of the President, I have this day instructed the United States Attorney for the District of Washington to take an appeal to the Circuit Court of Appeals in case No. 551, United States *v.* Northern Pacific Railroad Company.

- The case referred to is the one which involved the right of the Northern Pacific railroad to lands within the conflicting limits or overlap near Portland, Oregon, under the grants of July 2, 1864 (13 Stat., 365), and the joint resolution of May 31, 1870 (16 Stat., 378), which was recently decided adversely to the United States by the Circuit Court of the United States for the District of Washington,

upon the authority of the decision of the Supreme Court of the United States in the case of the United States *v.* Oregon and California Railroad Co., 176 U. S., 28.

By reason of the appeal so taken to the Circuit Court of Appeals from the decision of the Circuit Court of the United States for the District of Washington, all further action affecting the lands in question will be suspended until further direction is given, and all instructions of the Department to the contrary, which have been given since the decision of the Circuit Court of the United States for the District of Washington, are, for the time being, recalled, and action in pursuance thereof will also be suspended until other direction is given.

FOREST RESERVATION—LIEU SELECTION—ACT OF JUNE 4, 1897.

CHARLES H. COBB.

Proof that land is uninhabited is not the equivalent of proof that it is vacant or unoccupied.

No vested right is obtained under the act of June 4, 1897, until the selector has, among other things, perfected his selection by the submission of proof that the selected land is non-mineral and unoccupied; and until this condition precedent is complied with the land is subject to exploration under the mining laws, and if found to be mineral in character is no longer subject to selection, and no right can be secured by any subsequent attempt to perfect an incomplete selection under which no right vested prior to the development of the mineral quality of the land.

An applicant to make selection under the act of June 4, 1897, who has in other respects complied with the statute and existing regulations, but has failed to furnish the requisite proof of the character and condition of the land selected, may subsequently perfect his selection by submitting proof that such land was, at the time of the presentation of his selection, and still continues to be, of the character and condition subject to selection, the rights of the selector to be determined as of the date when the selection is thus completed.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *February 5, 1902.*

Charles H. Cobb has appealed from your office decision of August 22, 1901, rejecting his application, under the act of June 4, 1897 (30 Stat., 36), to select the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, E. $\frac{1}{2}$ of SW. $\frac{1}{4}$, and SE. $\frac{1}{4}$ of Sec. 26, T. 27 N., R. 8 E., W. M. (280 acres), Seattle, Washington, in lieu of the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, and NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 2, T. 30 N., R. 15 W., W. M., and lots 2, 3, and 4 of Sec. 2, and lot 1 of Sec. 3, T. 28 N., R. 13 W., W. M., in the Olympic forest reserve, Washington.

November 17, 1899, Cobb recorded in the proper county office his deeds of relinquishment to the government of his land in the forest reserve, and, December 1, 1899, presented at the local land office his

recorded deeds, abstracts of title, and application for selection, and an affidavit made that day before the register of the local office, that the selected land was non-mineral and uninhabited, but there was no affidavit that it was vacant or unoccupied.

Your office decision appealed from rejected the selection, because of the absence of the requisite proof of non-occupancy.

The decision of your office was right. Proof that the land was uninhabited was not the equivalent of proof that it was vacant or unoccupied, and, therefore, did not satisfy the statute or the existing regulations (28 L. D., 521, 524). An imperfect selection, such as this, should have been rejected by the local officers at once, upon its presentation. It was not incumbent upon them to invite the selector to present the requisite proofs and to await his action in that matter. Unless his selection conformed to the law and regulations, he was not entitled to have it received by the local officers and noted upon the records of their office. But the local officers, seemingly not understanding their duty, departed therefrom, and received this incomplete selection and noted the same upon the records of their office. The papers were then transmitted to your office, where they remained, awaiting examination and consideration, until your office decision of August 22, 1901.

Since your office decision, appellant has transmitted to the Department what purports to be proof that the selected land was unoccupied at the time of presenting the selection to the local office, and that it is still unoccupied and non-mineral; so that the question is presented as to whether an applicant, under the act of June 4, 1897, who has in other respects complied with the statute and existing regulations, but has failed to furnish the requisite proof of the character and condition of the land selected, may subsequently perfect his selection by submitting proof that such land was, at the time of the presentation of his selection, and still continues to be, of the character and condition subject to selection.

The land here applied for was surveyed at the date of the application, and is therefore unaffected by the provisions of the act of June 6, 1900 (31 Stat., 614).

The question presented has heretofore been practically decided in the affirmative in the cases of *Gray Eagle Oil Company v. Clarke* (30 L. D., 570, 581) and *Gary B. Peavey* (31 L. D., 186).

No vested right is obtained, under the act of June 4, 1897, until, among other things, the selector has perfected his selection by the submission of proof that the land selected is non-mineral and unoccupied. Until this condition precedent is complied with, the land is subject to exploration under the mining laws; and if it is discovered or found to be mineral in character, it is not longer subject to selection, and no right can be secured by any subsequent attempt to complete or

make effectual an incomplete selection under which no right vested prior to the development of the mineral quality of the land. *Kern Oil Company v. Clarke* (30 L. D., 550); *Gray Eagle Oil Company v. Clarke* (30 L. D., 570). But so long as the land selected remains of the character and condition subject to selection and the matter is one between the selector and the government, the selector (where, as in this instance, his selection has been received by the local officers and noted upon the records of their office) may submit the required proof at a time subsequent to the presentation of the selection, if it be still pending undisposed of, the rights of the selector, however, to be determined as of the date when the selection is thus completed.

The case is therefore returned to your office, to be disposed of in accordance with the views herein expressed, if the selection be one which in other respects conforms to the statute and existing regulations.

BOUNTY LAND WARRANT—ACTS OF MARCH 3, 1855, AND MARCH 2, 1889.

CHARLES P. MAGINNIS.

The owners of bounty land warrants issued under the act of March 3, 1855, which provides for the location of such warrants upon any lands of the United States subject to private entry, have the same rights with reference to the location thereof as they would have had if the act of March 2, 1889, restricting the sale of public lands at private entry to the State of Missouri, had not been passed.

The case of Joseph T. Brown, 21 L. D., 47, in so far as in conflict with this decision, overruled.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) February 5, 1902. (A. S. T.)

On September 13, 1901, Charles P. Maginnis applied to locate the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 4, and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 9, T. 55 N., R. 13 W., Duluth land district, Minnesota, in satisfaction of military bounty land warrant No. 92237, for one hundred and twenty acres, issued to Benjamin Peck, on June 3, 1857, and assigned to said Maginnis.

The local officers rejected said application on the ground that the land applied for was not subject to such location, and from their action Maginnis appealed to your office.

On January 15, 1902, you transmitted said application and accompanying papers to this Department, stating that:

The attorneys for Maginnis claim that such warrants are locatable in the same manner as surveyor-general's certificates of location under departmental decision in the case of Victor H. Provensal (30 L. D., 616).

You further state that the matter of locating military bounty land warrants as proposed herein has not been determined, and you submit the matter to this Department with a request for instructions as to the

question involved, which seems to be whether or not, since the passage of the act of March 2, 1889 (25 Stat., 854), such warrants may be located upon any of the public lands of the United States, except in the State of Missouri.

The warrant in question was issued under the act of Congress approved March 3, 1855 (10 Stat., 701), the provisions of which act are carried into the Revised Statutes at section 2414 and succeeding sections.

Section 2415 of the Revised Statutes provides that:

The warrants which have been or may hereafter be issued in pursuance of law may be located according to legal subdivisions of the public lands in one body upon any lands of the United States subject to private entry at the time of such location at the minimum price. When such warrant is located on lands which are subject to entry at a greater minimum than one dollar and twenty-five cents per acre, the locator shall pay to the United States, in cash, the difference between the value of such warrants at one dollar and twenty-five cents per acre, and the tract of land located on. But where such tract is rated at one dollar and twenty-five cents per acre, and does not exceed the area specified in the warrant, it must be taken in full satisfaction thereof.

It appears that the land applied for was "offered" on December 30, 1872, and it does not appear that it has ever been appropriated by cash entry, or otherwise, and is still a part of the public domain.

By section one of the act of March 2, 1889 (25 Stat., 854), it is provided that:

From and after the passage of this act no public lands of the United States, except those in the State of Missouri, shall be subject to private entry.

The ground upon which the local officers rejected the application in question appears to be that the land was not subject to such location, because said act of March 2, 1889, prohibits the disposal of it by private entry.

The 3rd section of the act of June 2, 1858, provides for the location of certain surveyor-general's certificates upon any of the public lands of the United States subject to sale at private entry at a price not exceeding one dollar and twenty-five cents per acre, and in the case of Victor H. Provensal, *supra*, which was an application to locate such certificate on public land in the State of Louisiana, on March 9, 1901, this Department held that the act of March 2, 1889, did not have the effect to repeal the act of June 2, 1858, so as to prevent such location of said certificates on public lands outside of the State of Missouri. It was therein held that the act of June 2, 1858, was intended to invest, and did invest, the holders of such certificates with certain rights and benefits, and that it was not the purpose of the act of March 2, 1889, to deprive them of such rights.

The act of March 3, 1855, under which the warrant in question was issued, is of the same character as the act of June 2, 1858, in that it is intended to confer certain rights and benefits upon a specified class of

persons, viz., those holding such warrants as the one here in question, and it was not the purpose of the act of March 2, 1889, to deprive them of these rights.

The act of December 13, 1894 (28 Stat., 594), provides—

That in addition to the benefits now given by law to all unsatisfied military bounty land warrants, under any act of Congress, and unsatisfied indemnity certificates of location under the act of Congress approved June second, eighteen hundred and fifty-eight, whether heretofore or hereafter issued, shall be receivable at the rate of one dollar and twenty-five cents per acre in payment, or part payment, for any lands entered under the desert land law of March third, eighteen hundred and eighty-seven, the timber culture law of March third, eighteen hundred and seventy-three, the timber and stone law of June third, eighteen hundred and seventy-eight, or for lands which may be sold at public auction, except such lands as shall have been purchased from any Indian tribe within ten years last past.

In the case of Victor H. Provensal, *supra*, it was held that the passage of this act, granting to the holders of such warrants and certificates these additional rights, did not show that Congress construed the act of March 2, 1889, to have repealed the act of June 2, 1858, but that it was the purpose of Congress to confer on the holders of these warrants and certificates certain rights *in addition* to those given by former statutes. Prior to that act such warrants and certificates might be used in the location of public lands which had been offered for sale, and the additional right conferred by the act of December 13, 1894, *supra*, was the right to use such warrants and certificates in payment for public lands taken or entered under any of the laws enumerated in said act.

There is some difference in the language employed in the act of June 2, 1858, and that of March 3, 1855. The last-mentioned act provides that these warrants may be located upon any of the public lands of the United States "subject to private entry *at the time of such location*," while the act of June 2, 1858, providing for the location of surveyor-general's certificates, provides that they may be located upon any of the public lands of the United States "subject to sale at private entry at a price not exceeding one dollar and twenty-five cents per acre." The later act does not, in express words, require that the lands located shall be subject to such sale at private entry *at the time of such location*, but the language used was evidently intended to have that meaning. The words "subject to sale at private entry" either refer to the time of the passage of the act, or to the time of the location of the certificates, and, if the latter, then the meaning is the same in that regard as that of the act of March 3, 1855, and this Department so construes the language in question.

This case having been referred to the Department without any action by your office on the application, and the applicant's attorney having filed his brief in your office in support of the application, it is treated as if it were before the Department on appeal.

It is held, therefore, that the owners of such military bounty land warrants have the same rights with reference to the location thereof as they would have had the act of March 2, 1889, never been passed, and that if there be no other objection, the warrant in question may be located upon the land applied for.

The case of Joseph T. Brown (21 L. D., 47), in so far as it conflicts with this decision, is overruled.

APPROXIMATION—EXCHANGE OF LANDS—ACT OF JUNE 4, 1897.

INSTRUCTIONS.

The rule of approximation permitted in entries under the homestead and other public-land laws may properly be applied in case of an exchange of lands under the act of June 4, 1897.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W.V. D.) *February 10, 1902.* (J. R. W.)

The Department has carefully considered your office letter, relative to cases arising under the exchange provisions of the act of June 4, 1897 (30 Stat., 36), wherein the area of the tract selected exceeds that of the one relinquished. You state that it was at first held by your office that no selection could be made the area of which exceeded that of the relinquished tract; refer to the departmental instructions of June 30, 1900 (30 L. D., 105), and the decision of March 21, 1901, in the case of Olette Johnson (unreported), and suggest that either the letter of the act should be followed and the area of the tract selected be required to exactly equal that of the tract relinquished, or that the act should be liberally construed so as to apply to cases of this class the rule of approximation applied in homestead and other entries, and permit the selector to pay for and retain the excess area in his selection when it is not greater than the deficiency would be should a minor subdivision be excluded therefrom.

The act provides that one holding land in a forest reservation may "relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent."

The Department recognizes the difficulty attending the administration of this statute in the class of cases referred to, and the suggestions made in your letter have been the subject of repeated consideration. It was held in the instructions of June 30, 1900, *supra*, that there was no authority in said act for applying the rule of approximation in cases of exchange of lands thereunder. The absence of such authority, together with the restrictive words limiting the lands taken to a quantity "not exceeding in area" the tract relinquished, led the Depart-

ment to the conclusion that there was no room for a construction permitting approximation in selections under the act.

But the words "not exceeding in area the tract covered by his claim or patent" are not more restrictive than similar words of limitation of quantity in many other land laws, as in Section 2279 (Revised Statutes): "No person shall have the right of preemption to more than one hundred and sixty acres;" (R. S. 2289) "which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres;" (R. S. 2306) "so much land as when added to the quantity previously entered shall not exceed one hundred and sixty acres;" (25 Stat., 854) "which shall not with the land first entered and occupied exceed in the aggregate one hundred and sixty acres;" (R. S. 2283) "not exceeding one hundred and sixty acres;" (26 Stat., 496) "not exceeding three hundred and twenty acres;" (20 Stat., 113) "not more than one quarter of any section shall be so patented."

Such words of limitation are as explicit, restrictive, and little susceptible of construction as are those in the act of 1897. Yet entries made under these statutes, under a long established practice of the land department, are permitted to include an excess above the area limited by the statutes. *J. B. Burns* (7 L. D., 20, 23); *Whitcher v. Southern Pacific Railroad Company* (3 L. D., 459); *Richard Dotson* (13 L. D., 275); *Abram A. Still* (13 L. D., 610); *James Hampton* (15 L. D., 449); *Charles W. Miller* (6 L. D., 339).

From an extended examination of the cases wherein the rule of approximation has been applied, it appears that in no instance was the rule founded upon statutory authority. The rule of approximation arose from no difficulty in construing the words of limitation, but because a literal execution of the statute was impracticable without frequent denial to entrymen of part of their entry right.

The surveys of public lands are required to be made in square sections of six hundred and forty acres, subdivided into quarters and sixteenths. The limitation of entry rights in the land laws is made with reference to the quantity that would result from such subdivisions of a regular section of six hundred and forty acres. From unavoidable causes the surveys result in frequent variations from the regular quantity that a section or its subdivisions should contain. To apply the limitations literally, allowing no excess, would frequently limit one having right to enter one hundred and sixty acres to a less quantity, frequently to slightly more than one hundred and twenty acres.

As Congress had in view the requirements of the law governing surveys, and the irregularity of quantity was, practically, unavoidable, and was no fault of the entry claimant, the rule of approximation originated as an administrative compromise between the irregularity of the survey and the right of the entry claimant. It was an administrative necessity to avoid, on one hand, injustice to the claimant, or,

on the other, the necessity of subdividing the smallest legal subdivision in an entry.

The rule has been applied in practice from the earliest statutes limiting quantity, as in cases of location of military bounty land warrants. It was established long before the act in question and prior to the enactment of the statutes above instanced. Congress has never disapproved of it. The rule being in practical operation, applied in cases of entries under other statutes similarly limiting quantity, it must be presumed that the act was passed with a view to the rule of approximation as a recognized part of the administration of the public land laws, with view to which the words of limitation were to be construed.

If regard is to be had to the statute alone, there is no more authority for the departmental rule permitting selections in excess of the area relinquished where "a slight difference only exists," than for the usual rule of approximation. It leaves the land department no course but to follow the literal words of the statute or to adopt the same rule it has followed in the administration of other similarly limited land laws.

As great reason might have been cogently urged against the adoption of the rule of approximation in the above-instanced statutes as can be urged against its application to selections under the act of 1897. They might have been held to be absolute limitations upon the quantity that an applicant could acquire under the act. The act of 1897 had for its object the reacquisition of title by the government of lands it had disposed of. If irregularities in area of subdivisions make the equal exchange impossible, the object of the law is attained and its spirit is observed in exchange of tracts as near equal as the irregularity of the survey permits, allowing the settler to pay for the excess as in other cases of approximation. The government can give in exchange no greater quantity than it receives, but to facilitate attaining the object of the act, the selector may buy the fraction of a subdivision in excess of the area of the one relinquished.

The act extended the right of selection to vacant land open to settlement, and the amendment of June 6, 1900 (31 Stat., 614), restricted it to "vacant, surveyed, non-mineral lands which are subject to homestead entry." Thus describing the lands subject to selection as those subject to homestead entry, no reason is apparent for more rigid adherence to the words of limitation of area than is given to similar words of limitation upon the appropriation of the same class of lands by homestead entry.

The government desires to re-acquire title to all lands it has heretofore disposed of within the forest reserves. The act must be so construed as to effect its object. If the selector must withhold a fractional tract from reconveyance until he finds another of the same area, the object of the act is impeded, and may be in part defeated. Such rule

of strict construction is applicable only to statutes of grant and to those imposing penalties and forfeitures. The act, on the contrary, is remedial and entitled to liberal construction.

It is, therefore, the conclusion of the Department that the exchange of lands under the act of 1897, made at the invitation of the government, to promote its own object, as well as the convenience of the owner of land in the forest reservation, may properly be made with regard to the long standing rule of approximation of quantity applicable generally to other entries under statutes limiting quantity. Your office is accordingly instructed to apply the rule of approximation to selections under the act of June 4, 1897.

REGULATIONS CONCERNING THE SELECTION OF DESERT LANDS BY
CERTAIN STATES.

CIRCULAR.

Section 4 of the act of August 18, 1894, entitled, "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1895, and for other purposes" (28 Stat., 372-422), authorizes the Secretary of the Interior, with the approval of the President, to contract and agree to patent to the States of Washington, Oregon, California, Nevada, Idaho, Montana, Wyoming, Colorado, North Dakota, South Dakota, and Utah, or any other States, as provided in the act, in which may be found desert lands, not to exceed 1,000,000 acres of such lands to each State, under certain conditions.

The text of the act is as follows:

SEC. 4. That to aid the public land States in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the Secretary of the Interior with the approval of the President, be, and hereby is, authorized and empowered, upon proper application of the State to contract and agree, from time to time, with each of the States in which there may be situated desert lands as defined by the act entitled "An act to provide for the sale of desert land in certain States and Territories," approved March third, eighteen hundred and seventy-seven, and the act amendatory thereof, approved March third, eighteen hundred and ninety-one, binding the United States to donate, grant and patent to the State free of cost for survey or price such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed, occupied, and not less than twenty acres of each one hundred and sixty-acre tract cultivated by actual settlers, within ten years next after the passage of this act, as thoroughly as is required of citizens who may enter under the said desert land law.

Before the application of any State is allowed or any contract or agreement is executed or any segregation of any of the land from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the said land proposed to be irrigated which shall exhibit a plan showing the mode of the contemplated irrigation and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops and shall also show the source of the water to be used for irrigation and reclamation, and the Secretary of the Interior may make necessary regulations for the reservation of the lands applied for by the

States to date from the date of the filing of the map and plan of irrigation, but such reservation shall be of no force whatever if such map and plan of irrigation shall not be approved. That any State contracting under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of this section; but the State shall not be authorized to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation and settlement.

As fast as any State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the State or its assigns for said lands so reclaimed and settled: *Provided*, That said States shall not sell or dispose of more than one hundred and sixty acres of said lands to any one person, and any surplus of money derived by any State from the sale of said lands in excess of the cost of their reclamation, shall be held as a trust fund for and be applied to the reclamation of other desert lands in such State. That to enable the Secretary of the Interior to examine any of the lands that may be selected under the provisions of this section, there is hereby appropriated out of any moneys in the Treasury, not otherwise appropriated, one thousand dollars.

In the act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1897, and for other purposes, approved June 11, 1896 (29 Stat., 413-434), there is, under the head of appropriation for "Surveying public lands," the following provision:

That under any law heretofore or hereafter enacted by any State, providing for the reclamation of arid lands, in pursuance and acceptance of the terms of the grant made in section four of an act entitled "An act making appropriations for the sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and ninety five," approved August eighteenth, eighteen hundred and ninety-four, a lien or liens is hereby authorized to be created by the State to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers; and when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such State without regard to settlement or cultivation: *Provided*, That in no event, in no contingency, and under no circumstances shall the United States be in any manner directly or indirectly liable for any amount of any such lien or liability, in whole or in part.

The limitation of time in the above-quoted section 4 was modified by section 3 of the act entitled—

"An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, nineteen hundred and two, and for other purposes," approved March 3, 1901 (31 Stat., 1133-1188), which provides as follows:

SEC. 3. That section 4 of the act of August eighteenth, eighteen hundred and ninety-four, entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five, and for other purposes," is hereby amended so that the ten years' period within which any State shall cause the lands applied for under said act to be irrigated and reclaimed, as provided in said section as amended by the act of June

eleventh, eighteen hundred and ninety-six, shall begin to run from the date of approval by the Secretary of the Interior of the State's application for the segregation of such lands; and if the State fails within said ten years to cause the whole or any part of the lands so segregated to be so irrigated and reclaimed, the Secretary of the Interior may, in his discretion, continue said segregation for a period of not exceeding five years, or may, in his discretion, restore such lands to the public domain.

The effect of this provision is to allow ten years for the irrigation and reclamation of each body of land segregated, the time to run from the date of the approval of the segregation. It also authorizes the Secretary of the Interior, in his discretion, to extend the time for irrigating and reclaiming the lands for a period of five years. At the expiration of the ten years, or of the extended period, the Secretary of the Interior may, in his discretion, restore to the public domain the lands not irrigated and reclaimed by the State.

1. The second paragraph of section 4, quoted above, requires that the State shall first file a map of the land selected and proposed to be irrigated, which shall exhibit a plan showing the mode of contemplated irrigation and the source of the water. In accordance with the requirements of the act, the State must give full data to show that the proposed plan will be sufficient to thoroughly irrigate and reclaim the land and prepare it to raise ordinary agricultural crops; for which purpose a statement of the amount of water available for the plan of irrigation will be necessary. The other data required can not be fully prescribed, as it will depend upon the nature of the plan submitted. All information necessary to enable this office to judge of its practicability for irrigating all the land selected must be submitted. Upon the filing of such map and accompanying plan of irrigation, the lands embraced therein will be withheld from other disposition until final action is had thereon by the Secretary of the Interior. If such final action be a disapproval of the map and plan, the lands selected shall, without further order, be subject to disposition as if such reservation had never been made; and the local officers will make the appropriate notations on the tract books and plat books, opposite those previously made, in accordance with the requirements of paragraph 7.

2. The map must be on tracing linen, in duplicate, and must be drawn to a scale not greater than 1,000 feet to 1 inch. A smaller scale is desirable, if the necessary information can be clearly shown.

3. The map and field notes in duplicate must be filed in the local land office for the district in which the land is located. A plan and field notes covering tracts selected in several land districts need be filed but once in duplicate; one copy in the other districts will be sufficient; but in such case a duplicate map of the lands, at least, must be filed in each local land office, showing the lands to be segregated in that district. The map and field notes must show the connections of termini of a canal or of the initial point of a reservoir with public survey corners, the connections with public survey corners wherever section or town-

ship lines are crossed by the irrigation works proposed, and must show full data to admit of retracing the lines of the survey of the irrigation works on the ground.

4. The map should bear an affidavit of the engineer who made or supervised the preparation of the map and plan, Form 1, page 234, and also of the officer authorized by the State to make its selections under the act, Form 2, page 234.

5. The map should indicate clearly the tracts selected, which must all be desert lands as defined by the acts of 1877 and 1891, and the decisions and regulations of this office therein provided for. The language of the former act and the decisions thereunder are as follows: "All lands exclusive of timber lands and mineral lands, which will not, without artificial irrigation produce some agricultural crop, shall be deemed desert land." It is prescribed also as follows:

First. Lands bordering upon streams, lakes, or other natural bodies of water, or through or upon which there is any river, stream, arroyo, lake, pond, body of water, or living spring, are not subject to entry under the desert-land law until the clearest proof of their desert character is furnished.

Second. Lands which produce native grasses sufficient in quantity, if unfed by grazing animals, to make an ordinary crop of hay in usual seasons, are not desert lands.

Third. Lands which will produce an agricultural crop of any kind, in amount to make the cultivation reasonably remunerative, are not desert.

Fourth. Lands containing sufficient moisture to produce a natural growth of trees are not to be classed as desert lands.

In this connection it has been held that it is a mere presumption that lands containing sufficient moisture to produce trees will produce agricultural crops, but, like all presumptions of fact, it may be rebutted by proof showing that the land is actually desert in character and will not produce agricultural crops without irrigation. (31 L. D., 149.)

6. The map should be accompanied by a list in triplicate of the lands selected, designated by legal subdivisions, properly summed up at the foot of each page, and at the end of the list. *Clear carbon* copies are preferred for the duplicate and triplicate lists. The lists should be dated and verified by a certificate of the selecting agent, Form 3, page 235. The party appearing as agent of the State must file with the register and receiver written and satisfactory evidence, under seal, of his authority to act in the premises; such evidence once filed need not be duplicated during the period for which the agent was appointed. The State should number the lists in consecutive order, beginning with No. 1, regardless of the land office in which they are to be filed. Form of title page to be prefixed to the lists of selections will be found on page 235, marked A. Lists received at this office containing erasures

will not be filed, but will be returned in order that new ones may be prepared. When a township has not been subdivided, but has had its exteriors surveyed, the whole township may be designated, omitting, however, the sections to which the State may be entitled under its grant of school lands. When the records are in such condition that the proper notations may be made, a section or part of a section of unsurveyed land may be designated in the list; but no patent can issue thereon until the land has been surveyed.

7. The lists must be carefully and critically examined by the register and receiver, and their accuracy tested by the plats and records of their office. When so examined and found correct in all respects, they will attach a certificate at the foot of each list, Form 4, page —. The register will thereupon post the selections in ink in the tract book after the following manner: "Selected ———, 19—, by A. B., agent for the State of ———, as desert land, act of August 18, 1894, list No. ———," and on the plats he will mark the tracts so selected "State desert land selection." After the selections are properly posted and marked on the records, the lists, maps, and all papers will be transmitted to this office. The date of filing will in all cases be noted on the map over the written signature of the register, as well as on all the papers. For rejected selections a new application and a new list will be required, upon which the register will note opposite each tract the objections appearing on the records and indorse thereon his reasons in full for refusing to certify the same. The agent will be allowed to appeal in the manner provided for in the Rules of Practice. It is required that clear lists of approvals shall in every case be made out by the selecting agents, if after the above examination one or more tracts have been rejected, showing clearly and without erasure the tracts to which the register is prepared to certify. On the map of lands selected the register will mark *rejected* such tracts as he has rejected on the lists.

8. There must also be filed a contract of Form 5, page 236, in duplicate, signed by the State officer authorized to execute such contract. A carbon copy of the contract *will not be accepted*.^a

9. When the canals or reservoirs required by the plan of irrigation cross public land not selected by the State, an application for right of way over such lands under sections 18 to 21, act of March 3, 1891 (26 Stat., 1085), should be filed separately, in accordance with the regulations under said act.

10. In the preceding paragraphs instructions are given for the designation of the lands by the proper State authorities. Upon the approval of the map of the lands and the plan of irrigation, the contract is

^a Printed copies of the contract, in which the list of lands can be inserted, will be furnished to the State, or to parties dealing with it, on application to the General Land Office.

executed by the Secretary of the Interior and approved by the President, as directed by the act. Upon the approval of the map and plan, the lands are reserved for the purposes of the act, said reservation dating from the date of the filing of the map and plan in the local land office. A duplicate of the approved map and plan, and of the list of lands, is transmitted for the files of the local land office, and a triplicate copy of the list is forwarded to the State authorities.

11. By the honorable Secretary's decision of January 22, 1898 (26 L. D., 74), it was held that the act of 1896 applies to all lands segregated under the act of 1894, and patents will be issued for all such lands in accordance therewith.

12. When patents are desired for any lands that have been segregated, the State should file in the local land office a list, to which is prefixed a certificate of the presiding officer of the State land board, or other officer of the State who may be charged with the duty of disposing of the lands which the State may obtain under the law, Form 6, page 237; and followed by an affidavit of the State engineer, or other State officer whose duty it may be to superintend the reclamation of the lands, Form 7, page 238.

13. The certificate of Form 6 is required in order to show that the State laws accepting the grant of the lands have been duly complied with.

14. The affidavit of Form 7 is required in order to show compliance with the provisions of the law, that an ample supply of water has been actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, for each tract in the list, sufficient to thoroughly irrigate and reclaim it, and to prepare it to raise ordinary agricultural crops.

15. These lists will be called Lists for Patent, and should be numbered by the State consecutively, beginning with No. 1. The list should also show, opposite each tract, the number of the approved segregation list in which it appears. The aggregate area should be stated at the foot of each page and at the end of the list.

16. Upon the filing of such list, the local officers will place thereon the date of filing, and note on the records opposite each tract listed: List for Patent No. ———, filed, ———, giving the date.

17. When said list is filed in the local land office there shall also be filed by the State a notice, in duplicate, prepared for the signature of the register and receiver, describing the land by sections, and portions of sections, where less than a section is designated (Form 8, page 238). This notice shall be published at the expense of the State once a week in each of nine consecutive weeks, in a newspaper of established character and general circulation, to be designated by the register as published nearest the land. One copy of said notice shall be posted in a conspicuous place in the local office for at least sixty days during the period of publication.

18. At the expiration of the period of publication the State shall file in the local office proof of said publication and of payment for the same. Thereupon the register and receiver shall forward the list for patent to the General Land Office, noting thereon any protests or contests on any of the following grounds: Failure to comply with the law, the nondesert character of the land, prior adverse rights, or the mineral character of the land, transmitting any papers filed, and submitting any recommendations they may deem proper. They will also forward proofs of publication, of payment therefor, and of the posting of the list in their office.

19. Upon the receipt of the papers in the General Land Office such action will be taken in each case as the showing may require, and all tracts that are free from valid protest or contest, and respecting which the law and regulations have been complied with, will be certified to the Secretary of the Interior for approval and patenting.

BINGER HERMANN,

Commissioner General Land Office.

Approved January 15, 1902.

E. A. HITCHCOCK,

Secretary of the Interior.

FORM 1.

STATE OF _____,

County of _____, ss:

_____, being duly sworn, says he is the engineer under whose supervision the survey and plan hereon were made (or is the person employed to make, etc.); that the tracts shown hereon to be selected are each and every one desert land as contemplated by the act of Congress approved August 18, 1894 (28 Stat., 372-422), the act of June 11, 1896 (29 Stat., 434); and the act of March 3, 1901 (31 Stat., 1133-1188), none being of the classes designated as timber or mineral lands; that the plan of irrigation herewith submitted is accurately and fully represented in accordance with ascertained facts; that the system proposed is sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary crops; and that the survey of said system of irrigation is accurately represented upon this map and the accompanying field notes.

Subscribed and sworn to before me this _____ day of _____, 19—.

[SEAL.]

Notary Public.

FORM 2.

STATE OF _____,

County of _____, ss:

_____, being duly sworn, says that he is the _____ (designation of office) authorized by the State of _____ to make desert-land selections under the act of Congress approved August 18, 1894 (28 Stat., 372-422), the act of June 11, 1896 (29 Stat., 434); and the act of March 3, 1901 (31 Stat., 1133-1188); that the plan of irrigation and survey herewith is submitted under authority of the State of _____; and

that the tracts shown hereon to be selected are each and every one desert land, as contemplated by the said acts of Congress, none being of the classes designated as timber or mineral lands.

Subscribed and sworn to before me this ____ day of ____, 19__.

[SEAL.]

Notary Public.

A.

STATE OF _____,
UNITED STATES LAND OFFICE,
_____, 19__.

_____, the duly authorized agent of the State of _____, under and by virtue of an act of Congress approved August 18, 1894 (28 Stat., 372-422), the act of June 11, 1896 (29 Stat., 434), and the act of March 3, 1901 (31 Stat., 1133-1188), and in pursuance of the rules and regulations prescribed by the Secretary of the Interior, hereby makes and files the following list of desert public lands which the State is authorized to select under the provisions of the said acts of Congress:

FORM 3.

STATE OF _____,
County of _____, ss:

I, _____, being duly sworn, depose and say that I am _____ (designation of office) authorized by the State of _____ to make desert-land selections under the act of Congress approved August 18, 1894 (28 Stat., 372-422), the act of June 11, 1896 (29 Stat., 434), and the act of March 3, 1901 (31 Stat., 1133-1188); that the foregoing list of lands which I hereby select is a correct list of lands selected under said acts; that the lands are vacant, unappropriated, are not interdicted timber nor mineral lands, and are desert lands as contemplated by the said acts of Congress.

Subscribed and sworn to before me this ____ day of ____, 19__.

[SEAL.]

Notary Public.

FORM 4.

UNITED STATES LAND OFFICE,
_____,
_____, 19__.

We hereby certify that we have carefully and critically examined the foregoing list of lands selected _____, 19__, by _____, the duly authorized agent of the State of _____, under the provisions of the act of Congress approved August 18, 1894 (28 Stat., 372-422), the act of June 11, 1896 (29 Stat., 434), and the act of March 3, 1901 (31 Stat., 1133-1188); that we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct. And we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and that the same are not nor is any part thereof returned and denominated as mineral or timber lands; nor is there any homestead or other valid claim to any portion of said lands on file or of record in this office; and that the said lands are, to the best of our knowledge and belief, desert lands, as contemplated by the said acts of Congress; and that the fees, amounting to \$_____, have been paid upon the said area of _____ acres.

_____, Register.
_____, Receiver.

FORM 5.

These articles of agreement, made and entered into this ____^a day of ____^a, A. D. 19—^a, by and between ____^a, Secretary of the Interior, for and on behalf of the United States of America, party of the first part, and ____^a, for and on behalf of the State of ____^a, party of the second part, witnesseth:

That in consideration of the stipulations and agreements hereinafter made, and of the fact that said State has, under the provisions of section 4 of the act of Congress approved August 18, 1894, of the act of Congress approved June 11, 1896, and of the act of Congress approved March 3, 1901, through ____^a, its proper officer, thereunto duly authorized, presented its proper application for certain lands situated within said State and alleged to be desert in character and particularly described as follows, to wit: List No. — (here insert list of lands and total area), and has filed a map of said lands and exhibited a plan showing the mode by which it is proposed that said lands shall be irrigated and reclaimed and the source of the water to be used for that purpose, the said party of the first part contracts and agrees, and, by and with the consent and approval of ____^a, President thereof, hereby binds the United States of America to donate, grant, and patent to said State, or to its assigns, free from cost for survey or price, any particular tract or tracts of said lands, whenever an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim the same, in accordance with the provisions of said acts of Congress, and with the regulations issued thereunder, and with the terms of this contract, at any time within ten years from the date of the approval of the said map of the lands.

It is further understood that said State shall not lease any of said lands or use or dispose of the same in any way whatever, except to secure their reclamation, cultivation, and settlement; and that in selling and disposing of them for that purpose the said State may sell or dispose of not more than 160 acres to any one person, and then only to bona fide settlers who are citizens of the United States or who have declared their intention to become such citizens; and it is distinctly understood and fully agreed that all persons acquiring title to said lands from said State prior to the issuance of patent, as hereinafter mentioned, will take the same subject to all the requirements of said acts of Congress and to the terms of this contract, and shall show full compliance therewith before they shall have any claim against the United States for a patent to said lands.

It is further understood and agreed that said State shall have full power, right, and authority to enact such laws, and from time to time to make and enter into such contracts and agreements, and to create and assume such obligations in relation to and concerning said lands as may be necessary to induce and cause such irrigation and reclamation thereof as is required by this contract and the said acts of Congress; but no such law, contract, or obligation shall in any way bind or obligate the United States to do or perform any act not clearly directed and set forth in this contract and said acts of Congress, and then only after the requirements of said acts and contract have been fully complied with.

Neither the approval of said application, map, and plan, nor the segregation of said land by the Secretary of the Interior, nor anything in this contract, or in the said acts of Congress, shall be so construed as to give said State any interest whatever in any lands upon which, at the date of the filing of the map and plan hereinbefore referred to, there may be an actual settlement by a bona fide settler, qualified under the public land laws to acquire title thereto.

It is further understood and agreed that as soon as an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs,

^a These blanks should be left vacant by the State agent.

to reclaim a particular tract or tracts of said lands the said State or its assigns may make proof thereof under and according to such rules and regulations as may be prescribed therefor by the Secretary of the Interior, and as soon as such proof shall have been examined and found to be satisfactory patents shall issue to said State, or to its assigns, for the tracts included in said proof.

The said State shall, out of the money arising from its disposal of said lands, first reimburse itself for any and all costs and expenditures incurred by it in irrigating and reclaiming said lands, or in assisting its assigns in so doing; and any surplus then remaining after the payment of the cost of such reclamation shall be held as a trust fund, to be applied to the reclamation of other desert lands within said State.

This contract is executed in duplicate, one copy of which shall be placed of record and remain on file with the Commissioner of the General Land Office, and the other shall be placed of record and remain on file with the proper officer of said State, and it shall be the duty of said State to cause a copy thereof, together with a copy of all rules and regulations issued thereunder or under said acts of Congress, to be spread upon the deed records of each of the counties in said State in which any of said lands shall be situated.

In testimony whereof the said parties have hereunto set their hands the day and year first herein written.

_____,
Secretary of the Interior.

State of _____.

By _____.

APPROVAL.

To all to whom these presents shall come, Greeting:

Know ye, that I, _____, ^a President of the United States of America, do hereby approve and ratify the attached contract and agreement, made and entered into on the _____ day of _____, ^a 19____, ^a by and between _____, ^a Secretary of the Interior, for and on behalf of the United States, and _____, for and on behalf of the State of _____, under section 4 of the act of Congress approved August 18, 1894, the act approved June 11, 1896, and the act approved March 3, 1901.

FORMS FOR VERIFICATION AND PUBLICATION OF LISTS FOR PATENT.

FORM 6.

I, _____, do hereby certify that I am the _____, (designation of office) of the State of _____; that I am charged with the duty of disposing of the lands granted to the State in pursuance of section 4, act of August 18, 1894 (28 Stat., 372-422), the act of June 11, 1896 (29 Stat., 434), and the act of March 3, 1901 (31 Stat., 1133-1188); and that the laws of the said State relating to the said grant from the United States have been complied with in all respects as to the following list of lands, which are hereby submitted on behalf of the said State for the issuance of patent under said acts of Congress.

[Here add list of lands.]

^aThese blanks should be left vacant by the State agent.

FORM 7.

To follow list of lands.

STATE OF _____,

County of _____, ss:

_____, being duly sworn, deposes and says that he is the _____ (designation of office) of the State of _____, charged with the duty of supervising the reclamation of lands segregated under section 4, act of August 18, 1894 (28 Stat., 422), the act of June 11, 1896 (29 Stat., 434), and the act of March 3, 1901 (31 Stat., 1133-1188); that he has examined the lands designated on the foregoing list, and that an ample supply of water has been actually furnished (in a substantial ditch or canal, or by artesian wells or reservoirs) for each tract in said list, sufficient to thoroughly irrigate and reclaim it, and to prepare it to raise ordinary agricultural crops.

Subscribed and sworn to before me this _____ day of _____, 19____.

[SEAL.]

_____,
Notary Public.*Form for published notice.*

FORM 8.

UNITED STATES LAND OFFICE,

_____, _____, 19____.

To whom it may concern:

Notice is hereby given that the State of _____ has filed in this office the following list of lands, to wit, _____, and has applied for a patent for said lands under the acts of August 18, 1894 (28 Stat., 372-422), June 11, 1896 (29 Stat., 434), and March 3, 1901 (31 Stat., 1133-1188), relating to the granting of not to exceed a million acres of arid land to each of certain States; and that the said list, with its accompanying proofs, is open for the inspection of all persons interested, and the public generally.

Within the next 60 days following the date of this notice, protests or contests against the claim of the State to any tract described in the list, on the ground of failure to comply with the law, on the ground of the nondesert character of the land, on the ground of a prior adverse right, or on the ground that the same is more valuable for mineral than for agricultural purposes, will be received and noted for report to the General Land Office at Washington, D. C.

_____, *Register.*_____, *Receiver.*

HAWAIIAN LANDS-EXCHANGE.

OPINION.

In the case of an exchange of public lands in Hawaii, under the Hawaiian laws, for lands of private ownership, the title should be taken to the Territory if the land thus acquired is for uses of local government; but if in such exchange the lands are obtained for other than local public uses (the authority for which is not herein determined), the conveyance should be made to the United States.

*Assistant Attorney General Van Devanter to the Secretary of the Interior,
February 7, 1902.*

You have referred to me for opinion the question propounded in a letter of the governor of the territory of Hawaii:

Whether, in cases of exchange of lands authorized by the laws of Hawaii, private parties should convey the lands to the United States or the territory of Hawaii.

The governor's letter was written in answer to your letter of March 8, 1901, requesting information respecting public land transactions in Hawaii, and the occasion for the question propounded by the governor sufficiently appears from the following part of his letter:

In regard to the fourth paragraph of the said letter, to wit: that "information is also desired as to whom, in cases of exchange of lands authorized by statute, private parties convey their lands, whether to the United States or national government, or to the territory of Hawaii," such conveyances so far have been made to the territory of Hawaii. Nearly all exchanges have been for street and road widening. I am not sure that we have taken the correct course, but inasmuch as section 91 of the territorial act provides that "all moneys in the Hawaiian treasury and all the revenues and other property acquired by the Republic of Hawaii since said cession (joint resolution of annexation) shall be and remain the property of the territory of Hawaii," it would appear that such acquisitions which have taken place before June 14, 1900, the date when the territorial act went into effect, were intended to vest in the territory of Hawaii.

Quære: Whether conveyances for street purposes should not in any case be made to the territory of Hawaii? I desire your instructions in this matter, and if our course has been a mistaken one, I shall have the matter rectified as soon as it can be legally accomplished.

The question presented necessarily suggests the antecedent one of authority to make exchange of lands. The governor has not indicated by what law of Hawaii authority is, or is supposed to be, given for disposal of public lands in or by way of exchange.

Section 169 of the laws of Hawaii, 1897, gives the Minister of the Interior (now Commissioner of Public Lands)—

power to lease, sell, or otherwise dispose of the public lands, and other property, in such manner as he may deem best for the protection of agriculture, and the general welfare of the Republic (Territory), subject, however, to such restrictions as may, from time to time, be expressly provided by law.

Section 201 provides that—

patents may be issued in exchange for deeds of private lands or by way of compromise upon the recommendation of the Commissioners and with the approval of the Executive Council without an auction sale.

Section 178 provides that:

The provisions of section 177 shall not extend or apply to cases where the government shall by quit-claim, or otherwise, dispose of its rights in any land by way of compromise or equitable settlements of the rights of claimants, nor to cases of exchange, or sales of government lands in return for parcels of land acquired for roads, sites of government buildings, or other government purposes.

Section 186 provides that:

In this act, if not inconsistent with the context, "public lands" means all lands heretofore classed as government lands, all lands heretofore classed as crown lands, and all lands that may hereafter come into the control of the government by purchase, exchange, escheat, or by the exercise of the right of eminent domain, or otherwise, except as below set forth.

Sections 312 to 357, inclusive, relate to opening, improving, and closing highways, under which proceedings may be had for ascertaining damages for land taken for such purposes. Section 334 relates to the settlement of damages in such cases, and provides that:

The Minister shall have the power to compound and compromise with any claimant, owner, or party interested, either before or after any such decision of the Commissioners in any way he may deem most advantageous to the government, and for that purpose *may substitute other land in lieu of that taken.*

These are the only provisions found by me which relate to exchanges of public lands for private lands. The existence of a power to make exchanges is clearly indicated by these citations, but the extent of and limitations upon that power are not at all well defined.

The joint resolution of annexation of July 7, 1898 (30 Stat., 750), recited that the government of the Republic of Hawaii ceded and transferred to the United States—

the absolute fee and ownership of all public, government, or crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining:

and declared:

That said cession is accepted, ratified and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.

The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: *Provided*, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

No words could be more comprehensive, nor can it be doubted that the title of all public property of the Republic of Hawaii of every kind vested thereby in the United States and that the public lands in Hawaii became subject to the sole disposal of Congress, under the pledge respecting the use of the revenue from or proceeds of the same.

No law for the disposal of the public lands in Hawaii was continued in force by the joint resolution of annexation, and the existing United States public land laws being declared inapplicable, the inevitable conclusion is that all power of sale or alienation of the public lands in Hawaii by the Hawaiian authorities ceased at the annexation of the islands by the United States. Only the governmental powers of the then-existing government were saved in force by the third paragraph of the joint resolution of annexation. From July 7, 1898, until the act of April 30, 1900, there was no power existing to alienate in any

manner any of the public lands in Hawaii for any purpose, by exchange or otherwise.

The act of April 30, 1900 (31 Stat., 141), section 73, provides:

That the laws of Hawaii relating to public lands, the settlement of boundaries, and the issuance of patents on land-commission awards, except as changed by this act, shall continue in force until Congress shall otherwise provide. That, subject to the approval of the President, all sales, grants, leases, and other dispositions of the public domain, and agreements concerning the same, and all franchises granted by the Hawaiian government in conformity with the laws of Hawaii, between the seventh day of July, eighteen hundred and ninety-eight, and the twenty-eighth day of September, eighteen hundred and ninety-nine, are hereby ratified and confirmed. . . . And no lease of agricultural land shall be granted, sold, or renewed by the government of the territory of Hawaii for a longer period than five years until Congress shall otherwise direct. All funds arising from the sale or lease or other disposal of such lands shall be appropriated by the laws of the government of the territory of Hawaii and applied to such uses and purposes for the benefit of the inhabitants of the territory of Hawaii as are consistent with the joint resolution of annexation, approved July seventh, eighteen hundred and ninety-eight: *Provided*, There shall be excepted from the provisions of this section all lands heretofore set apart, or reserved, by executive order, or orders, by the President of the United States.

Section 91 of said act provides:

That the public property ceded and transferred to the United States by the Republic of Hawaii, under the joint resolution of annexation, approved July seventh, eighteen hundred and ninety-eight, shall be and remain in the possession, use, and control of the government of the territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States, by direction of the President or of the governor of Hawaii, and all moneys in the Hawaiian Treasury and all the revenues and other property acquired by the Republic of Hawaii since said cession, shall be and remain the property of the territory of Hawaii.

It is noticeable that: (1) Neither of these sections, or other provision of the act of 1900, vests in the Territory of Hawaii the title, or right of property to any of the properties transferred by the cession. (2) That the Hawaiian public land laws are "continued" in force but without words giving retroactive effect from September 28, 1899, to July 7, 1898. (3) That acts done under assumed authority of Hawaiian laws between those dates are ratified and confirmed "subject to approval of the President of the United States," and without such approval are not confirmed by the act. (4) That in respect to the public property ceded and transferred to the United States under the joint resolution of annexation, all that passed to the Territory by the act of 1900 were the "use, possession, and control" thereof.

The last clause of section 91, *supra*, is noticeable in that it recognizes the Hawaiian government as continuing to exist after the cession, with the incident to organized social existence of capacity to acquire and hold property.

The Hawaiian Republic before its annexation had all the powers incident to a sovereign state, and, though the sovereignty ceased by annexation, the condition of an organized body politic has continued unbroken, though modified in form and powers. The power incident to all organized governments to take, acquire, and hold property for public use has never been lost or taken away. The title to all public property had, before the cession, vested in the United States, with the expressed intention that the public lands should be subject to the management and disposition of Congress for the use and benefit of the Hawaiian people, but subject to the right of the United States to use and occupy parts of such land to its own civil, military, or naval purposes. Whatever Hawaii acquired after the cession and before April 30, 1900, was, by the act of that date, confirmed to the Territory.

Hawaii has, therefore, always had power to acquire and hold property for public use. When exchanges of land are made, if that granted is part of the public domain and that acquired is for local public use, the grant should be regarded as in administration *pro tanto* of the trust upon which the public lands in Hawaii were received by the United States. To whom the title of the property acquired by the exchange should be taken depends upon the purpose of its acquisition. If the land acquired is for uses of local government, such as "street and road widening and extension" named by the governor, title should be taken to the Territory. The United States has no interest in public property of that kind acquired after the cession, except the sovereign right of supervision of the local government in the regulation of its use and its disposal of it. Public property of that kind, strictly of local interest, belongs to the local government, and in acquisition of it title should be taken to the Territory of Hawaii. This would be the result if the same public lands were sold and the proceeds used for this local public purpose in pursuance of the resolution of annexation. By adopting the Hawaiian public land laws, including those relating to exchanges, Congress indicated its consent that this should be accomplished by the more direct method of an exchange wherever that is authorized by the laws of Hawaii.

Whether exchanges of public land are authorized by the Hawaiian laws where the lands acquired in exchange are obtained for other than local public uses—as, for instance, to be part of the public domain and subject to disposal as such—I have not fully inquired, but if so the conveyance should not be made to the Territory of Hawaii, but to the United States, which is holder of the public lands as sovereign, though pledged to apply them solely to the use and benefit of the inhabitants of the Hawaiian Islands.

Approved, February 7, 1902:

E. A. HITCHCOCK, *Secretary*.

INDIAN LANDS—BITTER ROOT VALLEY—ACTS OF JUNE 5, 1872, AND
FEBRUARY 11, 1874.

WEBB McCASLIN.

The acts of June 5, 1872, and February 11, 1874, constitute the only authority for the disposal of lands in the fifteen townships in the Bitter Root Valley opened to settlement by the act of June 5, 1872, and said acts specifically provide for their disposal to actual settlers only; hence said lands are not subject to entry under the timber and stone act.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) February 13, 1902. (C. J. G.)

Webb McCaslin appeals from the decision of your office of December 5, 1901, holding for cancellation his timber and stone entry, made December 27, 1899, for the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 21, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 28, T. 11 N., R. 20 W., Missoula land district, Montana.

This tract was included in the lands ceded to the United States by the Flathead and other Indians under the treaty of July 16, 1855, ratified by the Senate March 8, 1859 (12 Stat., 975). It is within one of the fifteen townships in the Bitter Root Valley above the Lo-Lo fork of the Bitter Root River—as shown by the map of said valley approved by the Department April 14, 1894—opened to settlement by the act of June 5, 1872 (17 Stat., 226). The language of the treaty making the cession is as follows:

The said confederated tribes of Indians hereby cede, relinquish, and convey to the United States all of their right, title and interest in and to the country occupied or claimed by them.

By the second article of the treaty there was set apart and reserved from the lands thus ceded a general reservation, known as the Jocko reservation—which did not embrace the fifteen townships referred to in the act of 1872, *supra*—for the exclusive use and occupation of the Indians, “guaranteeing, however, the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named.”

The eleventh article of said treaty provided that—

the Bitter Root Valley, above the Loo-lo fork, shall be carefully surveyed and examined, and if it shall prove, in the judgment of the President, to be better adapted to the wants of the Flathead tribe than the general reservation provided for in this treaty, then such portions of it as may be necessary shall be set apart as a separate reservation for the said tribe. No portion of the Bitter Root Valley, above the Loo-lo fork, shall be opened to settlement until such examination is had and the decision of the President made known.

The President's proclamation of November 14, 1871, issued in pur-

suance of said article, recited that the Bitter Root Valley, above the Loo-lo fork, having been carefully surveyed and examined—

had proved, in the judgment of the President, not to be better adapted to the wants of the Flathead tribe than the general reservation provided for in said treaty. It is therefore deemed unnecessary to set apart any portion of said Bitter Root Valley as a separate reservation for Indians, referred to in said treaty.

The act of June 5, 1872, *supra*, provided for the removal of the Flathead and other Indians from the Bitter Root Valley to the Jocko reservation, the opening of fifteen townships within said valley, above the Lo-Lo fork, to settlement, and the sale of said lands in legal subdivisions, to "actual settlers only." It further provided that none of the lands should be open to settlement under the homestead and pre-emption laws, and that the sum of \$50,000.00 should be "reserved and set apart for the use of said Indians" out of the first moneys arising from the sales of said lands, to be expended in annual instalments of not more than \$5,000.00.

By the second section of the act of February 11, 1874 (18 Stat., 15), the benefit of the homestead act was extended to all settlers on lands within the Bitter Root Valley "who may desire to take advantage of the same."

The act of June 22, 1874 (18 Stat., 146, 173), provided that the proceeds from the sales of lands in the Bitter Root Valley, referred to in the act of June 5, 1872, should be paid into the Treasury, and that in lieu of the amount to be set apart from such proceeds, as provided for in that act, there should be an annual appropriation out of the Treasury of \$5,000.00, to be expended for the benefit of the Indians who were removed from said valley and who settled upon the Jocko reservation.

It is urged in support of McCaslin's entry that by virtue of the said acts of February 11 and June 22, 1874, and according to the language employed in the cases of Frank J. Morris and Joseph B. Syminsky (not reported), in which decisions were rendered April 18, 1901, and January 20, 1902, respectively, the lands in the Bitter Root Valley became "public lands," and as such subject to disposal under the public land laws, including the timber and stone act. In Morris's case it was said:

By the second section of the act of February 11, 1874 (18 Stat., 15), Congress extended the benefit of the homestead act to all settlers in the Bitter Root Valley "who may desire to take advantage of the same." The act of June 22, 1874 (18 Stat., 173), substituted an annuity for the sum originally intended to be raised from the sale of said lands under the act of 1872, for reimbursing said Indians, who are therefore in no way concerned in the method of disposal of said lands or the money derived from the same. Being public lands they were subject to said withdrawals for forestry purposes.

And in Syminsky's case it was said:

By the act of June 22, 1874 (18 Stat., 146, 173), Congress provided, by appropriation from the general funds of the Treasury, for payment of the trust to which the

lands were set apart, and that the proceeds of sale of lands in the Bitter Root Valley should be paid into the Treasury like the proceeds of sale of other public lands. The effect of this act was to extinguish all the interests of the Indians to such lands and revest in the United States full control thereof, thus making them subject to reservation for public purposes like other public lands.

There is no expression in either of those cases to the effect that the lands involved did not still remain subject to the general provisions for the disposal of said lands made by the act of 1872. It is not believed that the statements quoted are controlling of the question involved herein, the paramount question in those cases being as to the authority to temporarily withdraw lands pending the determination of the question as to the advisability of including the same in the Bitter Root forest reserve. Besides, the decision in the case of Henry E. Tiedt, rendered January 31, 1902 (not reported), which is similar to the cases referred to, more clearly and correctly describes the status of the lands in the Bitter Root Valley after the treaty of 1855 and the act of 1872, and the effect of the act of June 22, 1874, it being said therein:

The land was ceded by the Indians and its sale was directed by the act of 1872. There was no reservation of the land or of any interest in it to the Indians, only an appropriation of proceeds arising from the sale. That appropriation was satisfied by the act of June 22, 1874 (18 Stat., 146, 173), from the general funds of the Treasury. The government might at any time have reserved the land for any public purpose.

The language of the treaty of 1855 leaves it clear that there was no reservation of the land in the Bitter Root Valley, or any interest therein, to the Indians, except what may have been provided for in article eleven thereof. Even this, if it may be called a reservation or an interest, was extinguished by proclamation of the President prior to the act of 1872. The latter act limited the disposal of the lands in the Bitter Root Valley to "actual settlers only," and constitutes the only authority for the disposal of such lands, unless, as contended, the acts of February 11 and June 22, 1874, can be construed as constituting authority for a different disposal, which would necessarily amount to a repeal of the act of 1872. If there was a repeal it was by implication only, as said acts contain no express words of repeal; and repeals by implication are never favored. In the case of *Breannan v. Ferrell* (25 L. D., 266) it was held that the act of February 11, 1874, does not operate to repeal the general provisions for the disposition of lands in the Bitter Root Valley made by the act of June 5, 1872, it being stated that the language in said act of 1874, "who may desire to take advantage of the same," is permissive in character and does not imply that settlers on said lands may not, if they so elect, acquire title to such lands under the act of 1872. The act of June 22, 1874, which was an appropriation act, merely substituted a different mode for the disposal of the moneys arising from the sales of lands in the

Bitter Root Valley, referred to in the act of 1872, and in no sense can be construed as a repeal, express or implied, of the general provisions in said act relative to the mode of disposal of the lands themselves. Therefore as the said acts of June 5, 1872, and February 11, 1874, constitute the only authority for the disposal of the lands here in question, and specifically provide for their disposal to actual settlers only, they are not subject to entry under the timber and stone act. W. D. Harrigan (29 L. D., 153); and Joseph S. White (30 L. D., 536).

The decision of your office is hereby affirmed.

INDIAN LANDS—RESERVOIR—ACT OF FEBRUARY 13, 1897.

CHICAGO AND NORTHWESTERN R. R. CO. v. HARVEY.

The provisions in the act of March 2, 1889, limiting the disposal of lands within the ceded portion of the Great Sioux Indian reservation to actual settlers under the provisions of the homestead law and the laws relating to townsites, does not reserve said lands from the operation of the act of January 13, 1897, authorizing the use of public lands for reservoir purposes.

The approval of a map or plat of survey of a constructed reservoir, under the act of January 13, 1897, relates back as of the time of the filing thereof; and no further disposition should be made of the lands upon which such reservoir has been constructed, pending final action upon such map or plat, nor after the approval thereof.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *February 13, 1902.* (F. W. C.)

The Department has considered the appeal by the Chicago and Northwestern Railroad Company, successor to the Dakota Central Railway Company, from your office decision of October 4, last, wherein you overrule its protest against the allowance of the homestead entry made by Annie Harvey on July 17, last, for lot 7 and SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 6, NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 7, T. 5 N., R. 29 E., and hold for cancellation its reservoir declaratory statement, No. 14, filed January 5, 1899, under the provisions of the act of January 13, 1897 (29 Stat., 484), covering the SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of said Sec. 6, NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ and W. $\frac{1}{2}$ of NE. $\frac{1}{4}$, Sec. 7, T. 5 N., R. 29 E., all within the Pierre land district, South Dakota.

The lands in question are within the ceded portion of the Great Sioux Indian reservation, provision for the disposal of which is found in the act of March 2, 1889 (25 Stat., 888), the twenty-first section of which act provides—

That all lands in the Sioux reservation outside of the separate reservations herein described are hereby restored to the public domain . . . and shall be disposed of by the United States to actual settlers only under the provisions of the homestead law, except section 2301 thereof, and under the law relating to townsites.

Your office decision appealed from upon the authority of departmental decision of September 15, 1899, in the case of W. D. Harrigan (29 L. D., 153), held that the lands within the ceded portion of the Sioux reservation are not subject to the act of January 13, 1897, *supra*, providing for the reservation of lands upon which reservoirs are constructed for the purpose of furnishing water for live stock, because of the provision in the act opening these lands limiting their disposal to actual settlers under the provisions of the homestead law and the laws relating to townsites.

That said provision does not amount to a reservation of the lands so as to take them out of the operation of the act of January 13, 1897, is clear. See departmental decision in the case of Frank Laughrin (29 L. D., 147). In said case it was held that the act of May 2, 1890 (26 Stat., 81), in providing that the public land strip should be opened to settlement under the homestead laws, did not reserve said land from the operation of the act of January 13, 1897, *supra*, and in sustaining the application by Laughrin to file reservoir declaratory statement, it was necessarily determined that the allowance of such application did not amount to a disposal of the lands. A careful reading of the act of January 13, 1897, sustains this view, as it merely grants a use of the lands on which the reservoir is constructed so long as such reservoir is kept in repair and water kept therein.

In the Harrigan case referred to in your office decision, application had been made to have certain described water reserve lands ordered into market and sold under section 2455, Revised Statutes, as amended by act of Congress approved February 26, 1895 (28 Stat., 687). The act of June 20, 1890 (26 Stat., 169), providing for the restoration of the water reserve lands, limited the disposal of such lands, when restored, to homestead entry only. Harrigan's application contemplated a sale of the lands and, if granted, would have permitted a disposition contrary to the provisions of the act of 1890. The decision denying said application can in nowise affect the question as to the application of the act of January 13, 1897, which act, as before stated, grants only the use of the land for the purpose stated and does not contemplate the acquirement of title thereto.

The conclusion of the Department is therefore that the act of January 13, 1897, *supra*, is applicable to the ceded portion of the Great Sioux Indian reservation, and your office decision is therefore reversed.

It is shown in the record before the Department that on January 2, 1900, the railway company, in accordance with the provisions of section 3, of the act of January 13, 1897, filed in the local land office a map or plat upon which was delineated an accurate survey of its reservoir theretofore constructed upon the lands embraced in its declaratory statement, which map was duly forwarded to your office, but no action has been taken thereon. Said section provides that

upon the approval by the Secretary of the Interior of a map or plat of the constructed reservoir the lands on which the reservoir has been constructed shall be reserved from sale so long as such reservoir is kept in repair and water kept therein, and in its appeal the company asserts that in accordance with the regulations issued under the act of 1897, it has each year since the filing of its plat, furnished proof of the continued maintenance of the reservoir.

Notwithstanding the filing of such map or plat in January, 1900, it appears that on July 17, 1901, the local officers permitted Annie Harvey to make homestead entry, as hereinbefore set forth, including the greater portion of the lands on which the reservoir had been constructed.

Relative to the allowance of said entry your office decision stated—that the entry was allowed under instructions of January 25, 1901, as follows:

“You are advised that by letter of December 19, 1900, addressed to Robert Price, the former decision of this office in the matter of reservoir declaratory statements was reversed, and it is now held that the reservoir declaratory statement, under act of January 13, 1897 (27 Stat., 484), does not withdraw the land covered thereby from other entry.

It is therefore proper to accept homestead or other entries for such lands. The entryman, however, makes his entry subject to the right of the declarant to complete his reservoir and to use it in compliance with the law.”

Without considering the question of the propriety of allowing an entry to be made for lands upon which a reservoir declaratory statement has been filed, it would seem to be clear under the act of 1897 that upon the approval of a map or plat of survey of a constructed reservoir, the lands upon which such reservoir has been constructed are not thereafter subject to disposal, and it would seem to be equally clear that if such map or plat is, upon examination, found satisfactory and approved, its approval should be held to relate back as of the time of the filing of such map or plat. It results that after the filing of a map or plat of a constructed reservoir under said act, no further disposition should be made of the lands on which the reservoir has been constructed, pending final action upon such map or plat.

After a careful examination of the plat filed by the Dakota Central Railway Company of its constructed reservoir covering the land in question, the Department approves the same, and said map is herewith returned with the approval of the Department noted thereon, and you are directed to take steps looking to the clearing of the record of the entry by Annie Harvey, erroneously allowed under the views herein expressed.

HAWAII—EXCHANGE OF LANDS—SEC. 55, ACT OF APRIL 30, 1900.

OPINION.

The proviso in section 55 of the act of April 30, 1900, limiting the amount of real estate which any corporation operating in the Territory of Hawaii may acquire and hold therein to one thousand acres, precludes an exchange of lands owned by any such corporation for a quantity of public lands in said Territory aggregating more than one thousand acres.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, February 18, 1902. (A. C. C.)

The commissioner of public lands for the Territory of Hawaii, in a written communication, dated February 7, 1902, states that the McBryde Sugar Company, a Hawaiian corporation, has made application to exchange about 2,000 acres of land, owned by it in fee, situate on the island of Kauai, for about 6,000 acres of public land situate on the same island, and that Governor Dole desires to obtain a ruling—on the question, whether such exchange of land, if in other respects advisable would be precluded by reason of the proviso in section 55 of the organic act of the Territory, which requires that no association hold and acquire over one thousand (1,000) acres.

The question has been referred to me, with a request for an opinion.

It appears, from the papers submitted, that the McBryde Sugar Company was incorporated May 25, 1899, under the general laws of Hawaii relative to corporations and joint stock companies. At that time the power of Congress was supreme over the Territory of Hawaii and over the laws established therein. It could amend, modify, or repeal any law of said Territory, or directly legislate for it. In the exercise of its power to legislate for the Territory, Congress could revoke and repeal the laws under which said corporation was chartered, or limit the amount of real estate which any corporation, operating within said Territory, could thereafter acquire (*Mormon Church v. United States*, 136 U. S., 1, 45). That portion of the proviso to section 55 of the act to provide a government for the Territory of Hawaii (31 Stat., 141, 150), applicable to the present inquiry, is as follows:

Provided, That no corporation, domestic or foreign, shall acquire and hold real estate in Hawaii in excess of one thousand acres.

It is plainly evident, from the wording of the above, that Congress intended to limit the amount of real estate which any corporation operating in the said Territory could acquire and hold, to 1,000 acres. The power of Congress to enact such provision is unquestionable.

I am of the opinion, and so advise you, that the exchange of lands requested by the McBryde Sugar Company is prohibited by the proviso in section 55 of the aforesaid act.

Approved, February 18, 1902:

E. A. HITCHCOCK, *Secretary*.

INDIAN LANDS—COMMISSIONS—ACTS OF MARCH 2, 1889, AND AUGUST 15, 1894.

INSTRUCTIONS.

In view of the fact that the practice, in the administration of the acts of March 2, 1889, and August 15, 1894, relating to the disposition of lands in the late Sioux Indian reservations, respecting the commissions to be paid the register and receiver by the entryman, under the act of March 2, where he commutes his entry, and of requiring no commission on the commutation of an entry made under the act of August 15, is of long standing and has been uniformly adhered to, and that the administration of both these acts is now largely completed, no change in such practice will be made.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *February 19, 1902.* (F. W. C.)

Under your reference I have considered the letter of the Auditor for the Interior Department dated December 9th last, and relating to the commission to be collected by registers and receivers upon commuted homestead entries of lands within the late Sioux Indian reservations being disposed of under the homestead law, according to the special and respective provisions of the acts of Congress of March 2, 1889 (25 Stat., 888, 896—Sec. 21), and August 15, 1894 (28 Stat., 286, 319—Sec. 12).

It seems that early in the administration of each of these acts it was held that the commission which the homestead entryman was required to pay to the register and receiver (Sub-division 3, Sec. 2238 R. S.), in addition to the price of the land specially fixed in these acts, was to be ascertained by computing the prescribed percentage upon the ordinary price of public lands, viz., \$1.25 per acre (Sec. 2357 R. S.); in other words, that for the purpose of determining the commission to be paid to the register and receiver the price of the land was deemed to be \$1.25 per acre, while for the purpose of determining the purchase price to be paid by the entryman the price of the land was deemed to be \$3.75, \$1.25, 75 or 50 cents per acre, as the case may be, as specially prescribed in the acts in question. Another feature of this ruling seems to have been, that, under the act of 1889, on commutation of an entry, commission was required to be paid by the entryman on the basis that \$1.25 was the cash price, while under the act of 1894, no commission was required to be paid by the entryman on the commutation of an entry. This ruling seems to have been uniformly followed in the administration of these acts, until at least the time of the issuing by your office of the instructions of September 6, 1901, relating to the commission to be paid to registers and receivers upon homestead entries on ceded Indian reservations affected by the free homestead act of May 17, 1900 (31 Stat., 179), and commuted under the act of January 26, 1901 (31 Stat., 740). These instructions were confined to the commission on commuted entries and

did not purport to affect the commission upon original or final entries where commutation was not resorted to. Said instructions were also issued following the departmental decision of August 17, 1901 (31 L. D., 72), which related to the commission of registers and receivers on commuted homestead entries in the Chippewa ceded lands, the price of which was fixed at \$1.25 per acre (Act January 14, 1889, 25 Stat., 642), and hence that decision did not discuss or expressly pass upon the question arising under the two Sioux acts first above named, wherein the price to be paid for the lands is not the ordinary price of \$1.25 per acre fixed by section 2357 of the Revised Statutes.

If the question were an original one I would have much difficulty in reaching the conclusion that the price named in the acts of March 2, 1889, and August 15, 1894, does not fix both the purchase price to be paid by the homestead entryman and the basis for the computation of the commission to be paid to the register and receiver; and if the question were an original one I would have the same difficulty in holding that the commission to be paid in the event of the commutation of the entry was not the same as that to be paid upon final entry where there is no commutation, or that this commission was not to be paid under each of said acts. But in view of the original contrary ruling under these Sioux acts, and of the uniform adherence to that ruling, and of the fact that the administration of both acts is now largely completed, I feel that the better course, both from the legal and administrative standpoints, is to continue administering these acts under the ruling first established and since adhered to.

Your office should, therefore, notwithstanding the instructions of September 6, 1901, pursue the theretofore established method of determining the commission of registers and receivers under the acts of March 2, 1889, and August 15, 1894, and should transmit a copy of this letter to the Auditor for the Interior Department.

FOREST RESERVATION—LIEU SELECTION—ACT OF JUNE 4, 1897.

INSTRUCTIONS.

The reason for the requirement in the instructions of March 6, 1900, that the non-mineral affidavit filed with an application to make lieu selection under the act of June 4, 1897, should state whether the land selected is within six miles of any mining claim, does not exist where publication has actually been had as required by the regulations of December 18, 1899.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *February 19, 1902.* (J. R. W.)

The Department is in receipt of your request for information as to whether that portion of the departmental letter of March 6, 1900 (29 L. D., 580), referring to forest lieu selections under the act of June 4, 1897, which directs that "non-mineral affidavits should also state

whether the land so selected is within six miles of any mining claim," is to be regarded as mandatory upon your office. You state that your inquiry is founded upon the fact that in some of the later departmental decisions the non-mineral affidavit was treated as satisfactory although it did not contain this clause.

By the departmental regulations of December 18, 1899 (29 L. D., 391, 393), it is provided:

In selections of surveyed land which has been returned as mineral, or which is within six miles of any mining claim, and in all selections of unsurveyed land, notice of the selection, commencing within twenty days thereafter, must be given, for a period of thirty days, by posting upon the land and in the local land office, and by publication at the cost of the applicant in a newspaper designated by the register as of general circulation in the vicinity of the land and published nearest thereto. . . . Notice under this paragraph will not be required in any case of selections in States wherein the United States mining laws are not operative.

The paragraph in the instructions of March 6, 1900, to which you refer was evidently intended to supplement that portion of the regulations quoted above and furnish information to the local office upon which it might be aided in determining whether a publication should be had on account of the proximity of the selected tract to mining claims.

On informal inquiry at your office it is learned that in a larger proportion of the cases in which this question has arisen, the publication has actually been had, although the non-mineral affidavit that was furnished did not state whether the selected tract was within six miles of any mining claim. In cases like this it is apparent, where publication has been had, that the reason for this requirement in the affidavit no longer exists; but you are advised that in other cases you should still insist upon the requirement as originally made.

FOREST RESERVATION—LIEU SELECTION—ACT OF JUNE 4, 1897.

MARY E. COFFIN.

A proclamation of the President is immediately operative and imports notice to all the world.

Where a person owning lands within the limits of a forest reservation executes a deed of relinquishment thereof to the United States, under the act of June 4, 1897, and said lands are subsequently excluded from the reservation, while the deed remains in the control of the vendor and unrecorded, the vendor can acquire no rights under said act, by then filing the deed for record or causing it to be recorded.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *February 21, 1902.* (J. R. W.)

Mary E. Coffin appealed from your office decision of June 8, 1901, rejecting her application under the act of June 4, 1897 (30 Stat., 36), to select the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 6, and W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 18, T. 58 N., R. 8 W., 4th P. M., Duluth, Minnesota, in lieu of

the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ and lots 3, 4, and 5, Sec. 26, and lot 10, Sec. 27, T. 30 N., R. 11 W., W. M., formerly in the Olympic forest reserve, Washington.

April 6, Mrs. Coffin executed, and April 10, 1900, filed for record her deed conveying to the United States the title to the above described land relinquished as a base for said selection. April 7, 1900 (31 Stat., 1962), all of sections 25 to 36, inclusive, in T. 30 N., R. 11 W., including the land so relinquished, were by proclamation of the President withdrawn and excluded from the Olympic forest reserve, and all the public lands therein were restored to the public domain. April 20, 1900, Mrs. Coffin presented her application at the local office to make selection of land in lieu of that relinquished. Your office decision rejected the application, because the land assigned as base for the selection was not, at the time of the selection, in the forest reservation.

The reason assigned is not alone sufficient ground for rejection of the selection. Mary E. Coffin (31 L. D., 175). In that case the deed conveying the relinquished land to the United States was recorded when the land conveyed was within the forest reserve. In this case the deed was in the grantor's possession and control, and the relinquished land remained subject to any other disposal she might make at the time it was excluded from the reservation. Her unrecorded and undelivered deed of relinquishment in no way affected her title or dominion over the land, or gave her a right to make selection of land in lieu thereof, under the act of June 4, 1897, *supra*, which provides:

That in cases in which a tract covered by . . . a patent is included within the limits of a public forest reservation, the . . . owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his . . . patent.

If the act be viewed as "a standing offer or proposal of the government" for exchange of lands (Gideon F. McDonald, 30 L. D., 124), such proposal, standing on no consideration, could be withdrawn by the one making it at any time before its acceptance. The act authorizes relinquishment of land to the government only when it is included within a forest reservation. It also provides for exclusion of land from forest reserves by proclamation of the President when found to be improvidently included therein, so that the act itself gives notice that the proposal therein contained may be withdrawn at the pleasure of the government.

A proclamation of the President is immediately operative, and imports notice to all the world. In *Lapeyre v. United States* (17 Wall., 191), the President's proclamation was dated June 24, and—

was not published in the newspapers until the morning of the 27th of the month, nor was it published or promulgated anywhere or in any form prior to said last-named day, unless its being sealed with the seal of the United States, in the Department of State, was a promulgation thereof.

The court permitted no proof, holding the proclamation operative from its date, and said:

Conceding publication to be necessary, the officer upon whom rests the duty of making it should be conclusively presumed to have promptly and properly discharged that duty. If the proclamation here involved were a resolution or an act of Congress no such question could arise. That "a proclamation . . . if denied, *is to be tried by the record thereof*," and that in such case the proper plea is *nul tiel record*, seems to be conclusive upon the subject. It would be unfit and unsafe to allow the commencement of the effect whenever the question arises, whether at a near or a distant time, to depend upon the uncertainty of parol proof, or upon anything extrinsic to the instrument itself, as found in the archives of the nation.

This authority is conclusive. April 7, 1900, the land ceased to be subject to relinquishment to the United States under the act of 1897, *supra*. The act no longer authorized Mrs. Coffin to convey the land to the United States, or any officer to accept such conveyance, with view to her making a selection of other lands in lieu of those so conveyed. The deed recites that it is made under that act and with view to selection of other land. It therefore carried on its face notice of its invalidity. It would seem, therefore, necessarily to follow that its record, at a time when such conveyance was not authorized, in no way affected Mrs. Coffin's title to the land attempted to be conveyed. Whether the deed be a mere nullity or not, Mrs. Coffin, by filing it for record after April 7, 1900, acquired no right under the act of June 4, 1897, to make a selection of public land in lieu of that so attempted to be conveyed.

Your office decision is affirmed.

RAILROAD GRANT—EXCEPTED LANDS—SECTION 5, ACT OF MARCH 3,
1887.

NORTHERN PACIFIC RY. CO. *v.* BIGGS ET AL.

An expired pre-emption filing, of record at the date of the attachment of rights under the grant to the Northern Pacific Railroad Company, does not except the land covered thereby from the operation of the grant.

Purchasers under section 5 of the act of March 3, 1887, of lands covered by an expired pre-emption filing at the date of the attachment of rights under the grant to the Northern Pacific Railroad Company, and for that reason erroneously held to have been excepted from the grant, are not claimants adverse to the railroad company, and hence their claims are not subject to adjustment under the provisions of the act of July 1, 1898.

An application to purchase under section five of the act of March 3, 1887, can not be entertained until it has been finally determined that the land sought to be purchased is in fact excepted from the railroad grant.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) February 25, 1902. (F. W. C.)

The Northern Pacific Railway Company has appealed from your office decision of July 26, last, wherein it was held that there were no

such conflicting claims to the NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 11, T. 3 S., R. 4 E., Bozeman land district, and the NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and lot 9, of Sec. 7, T. 6 N., R. 2 E., Helena land district, Montana, as are subject to adjustment under the provisions of the act of July 1, 1898 (30 Stat., 597, 620).

From the statement contained in your said office decision, it appears that under the erroneous construction made of the decision of the supreme court in the case of *Whitney v. Taylor*, the lands above described were held to be excepted from the grant made in aid of the construction of the Northern Pacific railroad, because they were shown by the records of the land department to be embraced in expired pre-emption filings at the date of the attachment of rights under said grant in the vicinity of said lands. With regard to the first-mentioned tract the railroad claim was held to be eliminated September 16, 1898, and with regard to the last-mentioned tract October 5, 1898.

Because of such erroneous holding one George Biggs purchased the tract first above described on November 22, 1898, upon making proof under the provisions of section 5 of the act of March 3, 1887 (24 Stat., 556), and one Job Thompson made purchase of the last-described tract upon making proof under the same section of the act of 1887 on November 10, 1898, and upon these purchases patents were issued May 5, 1899, and July 15, 1899, respectively.

Under the decision of the supreme court in the case of *Northern Pacific Railroad Co. v. De Lacey* (174 U. S., 622), it must be held that the tracts above described passed to the Northern Pacific Railroad Company under its land grant, and it results that no title was acquired by reason of the purchase and patenting of these lands under the act of 1887. Because of this fact the Northern Pacific Railway Company, successor in interest to the Northern Pacific Railroad Company, invited your attention to these entries requesting that the conflicting claims to these lands be adjusted under the provisions of the act of July 1, 1898, *supra*, and your office decision of July 2, last, denied this request for the reason, as assigned, that beneficiaries under the act of 1898 are those having the status of claimants adverse to the railroad grant, while the purchases in question were not made by persons claiming adversely to the railroad grant, but their purchase was permitted because of proof of *bona fide* purchase of the lands from the railroad company.

In the circular of February 14, 1899 (28 L. D., 103), issued under the act of July 1, 1898, in defining who are beneficiaries under this act, it was said:

The act designates a class of beneficiaries whose status is that of claimants adverse to the Northern Pacific Railroad Company or its successor in interest, and in doing so, different words and terms of description are used in different portions of the act, but considering the act in its entirety, and giving due recognition to each provision therein, this class embraces any qualified person who, prior to January 1, 1898, by

settlement, entry, or purchase, initiated in good faith a claim to lands of the description given "under color of title or claim of right under any law of the United States or any ruling of the Interior Department," and who is still maintaining such claim conformably to such law or ruling. . . .

An individual claim adverse to the railroad claim is one which prior to January 1, 1898, was initiated in good faith by some qualified person, by settlement, entry, or purchase "under color of title or claim of right under any law of the United States or any ruling of the Interior Department," and which is still maintained conformably to such law or ruling, and is one which, in the absence of the railroad claim, could be perfected into full title.

The claims of these purchasers under the act of 1887 do not meet the conditions above described. It is clear that the purchasers do not claim adversely to the railroad grant. It is true that they have sought to perfect title to these lands through the United States, but it is only because of their claim under the railroad grant that, upon failure of the railroad title, the act of 1887 affords them, upon certain conditions, a right to purchase the lands of the United States. Further, these claims can not be held to have been initiated prior to January 1, 1898, for it was not held until long after that date that these lands did not pass under the railroad grant, and an application to make purchase under section five of the act of 1887 can not be entertained until it has been finally determined that the land sought to be purchased is in fact excepted from the grant. Nicholas Cochems (11 L. D., 629).

Your office decision is accordingly affirmed.

**SOLDIERS' ADDITIONAL HOMESTEAD—SECTIONS 2306 AND 2307,
REVISED STATUTES.**

ALLEN LAUGHLIN.

On the failure of a soldier to exercise his additional homestead right under section 2306, Revised Statutes, during his lifetime, it may, under section 2307 of such statutes, be appropriated by his widow, during her life and widowhood, or, in the event of her death without appropriating it, by the soldier's minor orphan children, during their minority, through a guardian duly appointed and officially accredited at the Department of the Interior; and in instances where it is not so appropriated, the estate of the soldier is not divested thereof.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) *February 25, 1902.* (G. B. G.)

This is the appeal of Allen Laughlin from your office decision of November 8, 1901, rejecting his application to enter, under section 2306 of the Revised Statutes, one hundred and twenty acres of land, to wit: the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 28, T. 29 N., R. 68 W., Cheyenne land district, Wyoming.

It appears that on May 28, 1870, one Francis M. Dewitt, who had served not less than ninety days in the army of the United States dur-

ing the war of the rebellion, made a homestead entry of forty acres of land at the Clarksville land office, Arkansas. He died in February, 1879, and left surviving him a widow and four minor children. The widow died in March, 1881, all of these children still being under age. July 12, 1900, the children having reached their majority, executed what purports to be an assignment to one William L. Taylor of the soldier's additional right of their father, Francis M. Dewitt, and on the same day Taylor assigned all his rights thereunder to the said Allen Laughlin. The action of your office is put upon the ground that said right was an asset of the soldier's estate to be administered, and can be legally assigned only by his personal representative.

The question presented is controlled by sections 2306 and 2307 of the Revised Statutes. These sections are as follows:

Sec. 2306. Every person entitled, under the provisions of section twenty-three hundred and four, to enter a homestead who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres.

Sec. 2307. In case of the death of any person who would be entitled to a homestead under the provisions of section two thousand three hundred and four, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children, by a guardian duly appointed and officially accredited at the Department of the Interior, shall be entitled to all the benefits enumerated in this chapter, subject to all the provisions as to settlement and improvement therein contained.

Francis M. Dewitt was a person entitled under the provisions of section 2304 of the Revised Statutes to enter a homestead, and had prior to the adoption of such statutes entered a quantity of land less than one hundred and sixty acres. He was therefore entitled to enter so much land as, when added to the quantity previously entered by him, would not exceed one hundred and sixty acres. In the nomenclature of the land department, he had a soldier's additional homestead right of one hundred and twenty acres. He did not exercise this right during his lifetime, and section 2307 of the Revised Statutes gives his widow, during her life and widowhood, the right to appropriate it to her use, and, in the event of her failure to appropriate it, gives his minor orphan children the right to appropriate it to their use, by a guardian duly appointed and officially accredited at the Department of the Interior. In this case it was not appropriated by either. The soldier's estate was never divested of the right. This could only be done by the act of the widow during her widowhood or on behalf of the children during their minority.

The decision appealed from is affirmed.

SOLDIERS' ADDITIONAL HOMESTEAD—PRACTICE—APPEAL.

JOHN M. UNDERWOOD ET AL.

Appeals by different parties, and relating to separate and distinct tracts of land, should be transmitted to the Department separately.

Where part of a homestead entry is canceled for conflict with a prior railroad grant, and the entryman thereupon elects to relinquish his entire entry, with the privilege of making a new entry elsewhere, there is no basis for a soldier's additional right, no part of the entryman's homestead right having been exhausted.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) February 26, 1902. (D. C. H.)

Your office, by letter of December 21, 1901, has transmitted to the Department the appeal of J. Vance Lewis (on behalf of John W. Willis and his assignees, John M. Underwood and Alexander Bowie) from the decisions of your office of December 12, 1901, holding for cancellation soldier's additional homestead entry, made April 9, 1901, by Alexander Bowie, at Cheyenne, Wyoming, for the SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 29, T. 21 N., R. 61 W., and soldier's additional homestead entry, made April 30, 1901, by John M. Underwood, at Oregon City, Oregon, for the S. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 2, T. 5 N., R. 5 W., both entries being based on the original entry made by John W. Willis, December 21, 1867, at Clarksville, Arkansas, for the NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 19 and SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 18, T. 10 N., R. 22 W.

It appearing, from the records in this case, that separate and distinct tracts of land are claimed in each appeal, and that there are different claimants, having no community of interest in said tracts, it was error to have united the two cases in one appeal. Your office should have required separate appeals, and should have transmitted each case to the Department separately, notwithstanding the fact that the same principle of law is involved in each case. *Griffin v. Marsh* and *Doyle v. Wilson* (2 L. D., 28); *Holmes C. Patrick et al.* (14 L. D., 271). Inasmuch, however, as the papers are before the Department, the appeal will be considered in the form transmitted.

Your office held the Bowie and Underwood additional homestead entries for cancellation on the ground that there was no basis for the alleged additional rights. The entry of Willis was canceled on October 15, 1868, as to the NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 19, for conflict with the prior rights of the Little Rock and Fort Smith Railroad Company, and he thereupon elected to relinquish his entire entry with the privilege of making a new entry elsewhere. By said action he was placed in the same condition that he would have occupied had he never made a homestead entry, his original right to make entry for one hundred and sixty acres was restored to him in its entirety, and, therefore, no part of his homestead right had been exhausted.

No error being found in your office decision, it is therefore affirmed.

VALENTINE SCRIP—UNUSED EXCESS.

FREDERICK W. McREYNOLDS.

By the location of Valentine scrip upon a legal subdivision of the public land of less area than that called for by the scrip, the locator does not waive or surrender his right to the excess or unused portion thereof.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) *March 7, 1902.* (J. R. W.)

Frederick W. McReynolds appealed from your office decision of May 8, 1901, refusing to issue to him certificates of right of location of "unused" portions of Valentine scrip E 74 and 75 for seven-tenths and six acres, respectively.

February 5, 1889, Paris Gibson located Valentine scrip E No. 74 on lot 4, and E 75 on lot 5, Sec. 33, T. 21 N., R. 4 E., M. M., Helena, Montana, patented September 24, 1889. Each piece of scrip was for forty acres, and the tracts contained 39.30 and 34 acres, respectively.

Your office decision held:

There is no authority of law for the issuance of this scrip in less than a "legal subdivision," and if, therefore, a party elects to locate a tract of land of less area than that of the scrip, he must take it in full satisfaction of his scrip.

The act of April 5, 1872 (17 Stat., 649), provided that Thomas B. Valentine or his legal representatives—

may select, and shall be allowed patents for, an equal quantity of the unoccupied and unappropriated public lands of the United States, not mineral, and in tracts not less than the subdivisions provided for in the United States land laws, and, if unsurveyed when taken, to conform, when surveyed, to the general system of United States surveys; and the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, shall be authorized to issue scrip in legal subdivisions.

The act in question was passed because Valentine claimed that he was owner of the Miranda Grant by title from Mexico, prior to acquisition of California by the United States, which, under the treaty of Guadalupe Hidalgo, it was pledged to recognize, and that the government had wrongly ignored his title, despoiled him of his land, and disposed of it to others. The act gave him opportunity to prove his claim before the courts, and provided that if he did so he should be allowed patents for an equal quantity of land. He established his contention and the scrip was issued to him. The grant was one of quantity. The compensation the government had long before received. The scrip conformed to the law. It was issued in quantities not less than legal subdivisions provided for in the land laws. The statute placed no further limitation or restriction on him. It gave him right to select an equal quantity of land. The government refused to permit division of the legal subdivisions of land made by its surveys. The words "in tracts not less than the subdivisions provided

for in the United States land laws" amount simply to saying no tract can be taken in part. Entries under this scrip must be taken by entire subdivisions; if any part of a subdivision is taken the entire subdivision must be taken.

The surveys of public lands are by law required to be in square sections of six hundred and forty acres, subdivided into sixteenths, but the law (R. S. 2395) recognizes this to be impracticable of exact performance, and directs where fractions shall be thrown, so that fractional subdivisions are subdivisions "provided for in the United States land laws." The law promises the holder of Valentine scrip an "equal quantity" and requires merely that he shall take all of any located subdivision. It does not require him to waive right to any excess of the scrip in case he locates a subdivision smaller than the area called for by the scrip, nor, in face of the statute giving him an equal quantity, has the land department any power to require him to do so. The case is, in legal aspect, strictly analogous to the additional military homestead right, but is stronger in equity in that the homestead right is a donation, of grace, not founded on valuable consideration, whereas the Valentine right arose upon a valuable and actual consideration previously received by the government in kind. Your office decision, therefore, erred in holding that location of the scrip upon subdivisions of smaller area implied a waiver of the excess. It must be held that the scrip is unsatisfied as to so much area as it exceeded the tract upon which it was located, and that the holder is entitled to make further location under it, if he finds and locates a subdivision upon which such location can be made. The location of a scrip certificate calling for forty acres upon a subdivision containing a less quantity cannot be held a waiver of the excess, for, by taking an entire subdivision, he complied with all legal requirements imposed by the statute. It cannot logically be held that one having a right waives any part of it by exact compliance with the law governing his exercise of it.

The scrip authorized by the act of April 5, 1872, *supra*, is like that issued under section 11 of the act of June 22, 1860 (12 Stat., 85). In respect to locations of scrip under the latter act, the circular of October 8, 1874 (C. P. L. L., 797), provided:

Parties applying to you to locate this scrip may do so in full satisfaction thereof, or if it call for more than the quantity of one of the smallest legal subdivisions, they may locate it in part satisfaction thereof.

* * * * *

You will then issue duplicate certificates according to form C, annexed, properly interlining the same to indicate that the location is in part satisfaction of the scrip, one of which you will deliver to the party, and the other the register will retain on his files as a record.

The location effected, you will endorse *on the scrip to be retained by the party* a certificate to bear the current date and to set forth the fact that it has been located in part satisfaction, giving the description and area of the tracts located therewith . . .

There is reasonable ground to contend that power exists to reissue duplicate scrip for the unsatisfied deficiency as incidental to the administration of the law. Opinion, 22 L. D., 40, 41; John Marris Pierro, 1 L. D., 303. It is, however, unnecessary to reissue scrip for the unsatisfied portion, as the scrip may be endorsed for the amount located and remain in the owner's hand, good only for the deficiency. McReynolds is, therefore, entitled to his original scrip, or a certified copy thereof, as may be by your office deemed preferable, endorsed, however, to show the amount located thereon, and available for location in compliance with the law.

Your office decision as so modified is affirmed.

TERRITORY OF NEW MEXICO—LAND GRANTS—ACT OF JUNE 21, 1898.

TERRITORY OF NEW MEXICO.

In the absence of further legislation, the officers named in section 8 of the act of June 21, 1898, making certain grants of lands to the Territory of New Mexico, will continue a commission for the selection of "all grants of land made in quantity or as indemnity" by said act, until its prescribed duty has been fully performed; but the appropriation made by section 11 of said act, "for the purpose of paying the expense of the selection and segregation" of the lands granted, including compensation to the commission, having been exhausted, the Department is precluded from making any further disbursement for compensation to or expenses incurred by the commission.

Circular of August 1, 1898, with respect to the disbursement of the appropriation made by section 11 of said act, annulled and discontinued, and the rules and regulations of July 20, 1898, governing the selections of land in the Territory of New Mexico under said act of June 21, 1898, continued in force and effect.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office, March 7, 1902.* (G. B. G.)

This is the matter of the request of the Governor of the Territory of New Mexico that the services of the commission for the selection of lands granted to that Territory by the act of June 21, 1898 (30 Stat., 484), be continued. Said act grants large quantities of the public lands in the Territory for various public purposes, and the commission for the selection of these lands is provided for by section 8 of the act, which constitutes the Governor, Surveyor-General, and Solicitor-General of the Territory a commission for the selection of the lands granted, "under the direction of the Secretary of the Interior." Section 11 of said act appropriated the sum of \$10,000, or so much as might be found necessary, to be expended under the direction of the Secretary of the Interior, "for the purpose of paying the expense of the selection and segregation of said respective bodies of land, including such compensation to said commission as the Secretary of the Interior may deem proper."

August 1, 1898, the Secretary of the Interior approved regulations (27 L. D., 302), which fixed the compensation of each of said commissioners at the rate of \$200 per annum, and provided for the appointment by the Secretary of the Interior of a locating agent at the sum of \$6.00 per day and actual expenses of transportation, and also provided for the appointment by such Secretary of a clerk for the commission, with compensation at the rate of \$1,000 per annum. Allowance was also authorized for office rent, fuel, and lights for the commission, not to exceed \$200 per annum. Pursuant to these regulations, one David M. White was appointed as a locating agent for the commission.

August 16, 1901, your office advised the Department that the appropriation was practically exhausted, and recommended that the services of the locating agent be dispensed with, and that the commissioners be instructed to close up the work of the commission with the least practical delay, and not later than September 15, 1901. On the same day the Secretary of the Interior notified Mr. White by wire that his services were dispensed with on that date, and August 19, 1901, instructed the Governor of the Territory to close up all work not later than September 15, 1901.

August 19, 1901, the clerk of the commission addressed a communication to the Department, stating that said commission desired to be informed if the services of Mr. White as locating agent could not be continued under the direction of the Department, his compensation to be provided for by the commission, and in nowise to be a charge against the United States.

September 5, 1901, the Department, considering this communication (Misc. Letter Press 445, page 268), denied the request for the continuation of Mr. White as locating agent without compensation from the general government, in view of the provisions of the act of May 1, 1884 (23 Stat., 15, 17), providing that no department or officer of the United States should accept voluntary service for the government, except in certain emergencies, and the commission was again directed to close up all work with the least practical delay, and not later than September 15, 1901.

September 27, 1901, the Governor of New Mexico and ex-officio president of the commission addressed a letter to the Department, in which he states that he called a special meeting of the commission for September 14th, the Solicitor-General and himself only being present at said meeting, and proceeded to and did close up the business of the meeting and adjourned *sine die*. He called attention to the fact, however, that the commission in April last had selected for the Territory about 150,000 acres of land in Rio Arriba and San Juan counties, for the benefit of the different territorial institutions, and directed its location on the ground by the locating agent, who did this the first

part of August, to the amount of 129,589.13 acres, and made his non-mineral affidavit on the 17th of August; that these lists of location were not submitted to the board by him for approval, for the reason that there was no quorum on the regular meeting day on the first Monday in September on account of the Governor's absence from the Territory; and nothing was done on the 14th because of the absence of the locating agent from Santa Fe; but that these selections had been made months before and the locations on the ground completed before the 16th of August, the date of the telegram relieving the locating agent from duty, and it is submitted to the Department that these selections should be examined by the commission, and, if found regular and correct, be approved by it, and the lists filed in the land office, in order that the various institutions may have the benefits of these lands, and that the labor and expense involved may result in some good; and it is requested that by proper order the Department allow the commission to pass upon these lists for the benefit of the Territory. The commission having adjourned *sine die* on September 14, 1901, it declined to receive lists on September 17th, without further instructions from the Department. It is also requested that the Department further consider its order directing the commission to close its business, and that said commission be allowed to go on with its duties as prescribed in the act, but "without any expense to the United States government, and with the distinct understanding that it will provide for any necessary disbursements in connection with these duties."

It would seem that this should be done. Section 8 of the act of June 21, 1898, constituting the Governor, Surveyor-General, and Solicitor-General of the Territory of New Mexico a board for the selection of lands granted by the act, does not depend upon section 11 of the same act appropriating \$10,000 for the purpose of paying the expenses of the selection and segregation of these lands. Section 8 is complete in itself, and, while the Secretary of the Interior has supervision and control of the work of the commission thereby constituted, he is not authorized to discontinue the commission. In the absence of further legislation, the officers therein named will continue a commission for the selection of "all grants of land made in quantity or as indemnity" by said act, until its prescribed duty has been fully performed. The only purpose of the appropriation made by section 11 was to assist the Territory in the payment of the expenses incident to the selection of these lands to the extent of \$10,000. The fact that this appropriation has been exhausted does not operate to terminate the authority conferred on the Governor, Surveyor-General, and Solicitor-General to select these lands, but merely precludes the Department from disbursing any further sum in support of this work. There is no reason why the board may not continue its selections, nor why it may not pass upon the validity of the locations heretofore made by

the locating agent. If the board cares to continue Mr. White, or any one else, as its locating agent, he would be continued as the agent of the Territory, and not as an officer of the United States.

Inasmuch as the appropriation is exhausted, the circular of August 1, 1898, which was issued for one purpose only—to wit, to provide for the disbursement of the \$10,000 appropriated by said act—is hereby annulled and discontinued, but the rules and regulations prescribed by the Department July 20, 1898 (27 L. D., 281), for making selections of land in said Territory, will be continued in full force and effect, and future selections under the act of June 21, 1898, will be made as therein directed.

TIMBER-LAND ENTRY—MINERAL LAND.

ANDREW v. STUART.

Old excavations or unoccupied cabins, situated on abandoned mineral locations, are not such "mining or other improvements" as will except the land upon which they are located from purchase as timber land under the act of June 3, 1878, as amended by the act of August 4, 1892.

The word "timber" as used in section 1 of the act of June 3, 1878, includes such trees, regardless of their dimensions, as may be used in erecting buildings or irrigation works, constructing railroads, tramways, or canals, building fences or corrals, timbering mining shafts or tunnels, or which may be utilized in the manufacture of any useful article.

Acting Secretary Ryan to the Commissioner of the General Land
(W. V. D.) *Office, March 15, 1902.* (A. C. C.)

January 19, 1900, Thomas B. Stuart filed, in due form, his application to purchase, under the act of June 3, 1878 (20 Stat., 89), as amended by the act of August 4, 1892 (27 Stat., 348), the S. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 29, T. 1 S., R. 73 W., Denver, Colorado, as chiefly valuable for timber. Notice was duly given.

March 19, 1900, H. S. Andrew filed his corroborated protest, alleging, in effect, that said land was not valuable chiefly for its timber, but was mineral in character; that mining and other improvements were situated thereon; and that it contained valid and subsisting mining locations.

April 4, 1900, in accordance with the notice previously given, applicant submitted his proofs. On the same date a hearing was had upon the protest, at which both parties appeared and submitted testimony. The local officers found in favor of the applicant, and recommended the dismissal of the protest. Upon appeal by protestant, your office, by decision of September 27, 1901, found that there existed three mining locations on the S. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of said section, with mining improvements thereon, and that applicant had failed to show that the S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of said section was valuable chiefly for

timber, and rejected the application to purchase. Applicant has appealed to the Department.

Both parties contend, and the record shows, that the land applied for is unfit for cultivation and has no value for agricultural purposes.

Three questions are presented for consideration and determination, viz.: (1) Are there such mining or other improvements upon the land as except it from purchase under the provisions of said acts? (2) Is it mineral in character? And (3) are the trees upon the land timber, such as is contemplated by the first section of the act of June 3, 1878, *supra*?

From the evidence, it appears that, previous to 1898, three lode mining claims had been located on the S. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of said section 29, upon which locations two discovery shafts, and another shaft forty-three feet deep, had been sunk and a small cabin erected, but that no work had been done upon said claims since 1898, and that the cabin was uninhabited. Further, that said mining locations had been practically abandoned prior to the date of the filing of the application to purchase. Old excavations or unoccupied cabins, situated on abandoned mineral locations, are not such "mining or other improvements" as except the land upon which they are located from purchase under the provisions of the acts aforesaid (*Chormicle v. Hiller*, 26 L. D., 9).

The return of the surveyor-general classes the land as non-mineral. Applicant's proof, filed before the hearing, furnished by himself and two others, shows that it is of the same character. The evidence of the applicant submitted at the hearing, which consists of the testimony of the witnesses who furnished the final proof, is to the same effect. Two witnesses were examined by the protestant. They testified, in a general way, that the land is mineral in character. They arrive at this conclusion by showing that the land has been extensively prospected; that there are some indications of mineral-bearing rock; and that mining locations have been made thereon. From the evidence of these witnesses, it appears that the mining locations so made had been abandoned previously to the time of the filing of the application to purchase. It was not shown that the prospecting had resulted in the finding of mineral of such character and value as to justify the expenditure of money and labor in extracting it, nor that the indications of mineral were such that a person of ordinary prudence would be justified in the expenditure of his labor and means, with a reasonable prospect of success in developing a mine on the lands. In addition to the absence of a showing that the land is mineral in character, the fact that mining locations made thereon were abandoned after improvements had been made upon them, raises a presumption, slight though it may be, that the land does not contain mineral in paying quantities. Testing the evidence by the rules of law applicable thereto, it is not

sufficient to show that the land applied for is valuable for mineral purposes.

No evidence was submitted by the applicant touching the kind or character of the timber upon the land. The only testimony upon this phase of the case came from one of protestant's witnesses, and is to the effect that there are no trees upon the land over twelve inches in diameter. From the return of the surveyor-general, however, it appears that the land is "covered with a good growth of pine trees," while the proofs submitted by the applicant show that the land is valuable chiefly for its timber, and that the timber, as it stands, is worth not less than \$25 per acre. In your office decision you find that the timber upon the land is not valuable for sawing into lumber, and but a small portion of it is large enough to be profitably sawed. Upon the authority of *Gibson v. Smith* (18 L. D., 249, 251) your office decision holds that the land is not chiefly valuable for timber; hence is not subject to entry under the provisions of said acts.

The evidence in the case of *Gibbon v. Smith*, *supra*, showed that the trees upon the land applied for were valuable only as cord wood, and it was held that the word "timber," as employed in the first section of the act of June 3, 1878, *supra*, did not refer to such trees. In this case there is no evidence, whatever, that the trees upon the land involved are valuable only for cord wood; neither is there any evidence that the "timber" shown to be upon the land is not valuable for sawing into lumber, nor that but a small portion is large enough to be profitably sawed. Your findings are evidently based upon the showing that none of the trees are of dimensions exceeding twelve inches in diameter.

Does the fact that the trees upon the land applied for have been shown not to be of greater dimensions than twelve inches in diameter exclude the land from entry under the provisions of said acts? The solution of this question depends upon the purpose of the act and intent of Congress in the employment of the word "timber," as the same appears in the first section thereof.

A reference to the act shows that the first section provides that lands valuable chiefly for timber or valuable chiefly for stone may be sold; the second and third sections prescribe the procedure under which title may be obtained; while the fourth section prohibits the cutting, destroying, or removing of timber growing upon the public domain, etc.

It is plainly evident, from the act as a whole, that the purpose of Congress was to provide a method by which title might be acquired to land which was unfit for cultivation and non-mineral in character, containing valuable deposits of stone, or a valuable growth of trees; and, further, to protect the public domain from being despoiled and denuded of its timber.

The purpose of the act being plain, the question arises as to the intent of Congress in the employment of the word "timber." "Timber" is a word in common and general use, and such words, when employed in a statute, "are to be understood in a popular sense in the absence of anything in the context to the contrary" (Sutherland, Stat. Const., Sec. 327).

In construing the word "timber," as the same appears in the act of March 2, 1831 (4 Stat., 272), entitled "An act to provide for the punishment of offences committed in cutting, destroying, or removing live oak and other timber or trees," and prohibiting the cutting, etc., of "any live oak or red cedar trees, or *other timber*, from lands of the United States," the United States circuit court for the district of Michigan, in *United States v. Schuler* (6 McLean, 28, S. C.; 27 Fed. Cas., 978, 981), says: "Unless the contrary clearly appears from the context, it will be presumed that the word was employed in its ordinary, popular sense."

There is nothing in the act indicating that Congress intended a different meaning from that in which it is generally understood. Timber, as defined by Webster, is "That sort of wood which is proper for buildings or for tools, utensils, furniture, carriages, fences, ships and the like."

It is common knowledge that a large part of what is known as "timber land" on the public domain, especially in the arid regions, does not have trees thereon of greater dimensions than twelve inches in diameter, and that such timber is generally used for the purpose of erecting buildings, manufacturing railroad ties, constructing fences and corrals, timbering mining claims, constructing irrigating ditches and flumes, and making other necessary improvements. It seems, therefore, that the word itself expresses with certainty the intention of Congress, and such being the case, it is not admissible to depart from that intention on any extraneous consideration or theory of construction (Sutherland, Stat. Const., Sec. 236, p. 312).

However, had there ever been any doubt as to the intention of Congress in the employment of the word "timber," as it appears in the first section of the act, that doubt has been removed by judicial determination.

The act under consideration is a part of the general system of laws enacted by Congress for the disposition of the public domain and for the preservation from waste and destruction of the timber thereon; hence it should be construed with reference to the whole system of which it forms a part (Sutherland, Stat. Const., Sec. 369). Section 2461, Revised Statutes, is a part of the above system, and, in purpose and intent, is the same as the fourth section of the act of June 3, 1878, and in language both sections are almost identical.

In construing the word "timber," as the same is used in said sec-

tion 2461, Revised Statutes, the circuit court of the United States for the southern district of Florida, in *United States v. Stores* (14 Fed. Rep., 824, 826), says:

The object of this prohibitory legislation is undoubtedly to prevent stripping the public lands of their growth of forests regardless of the present size and character of the individual trees, and the term used is intended to apply generally for that purpose; and if it is found that live trees of such a character or sort as might be of use or value in any kind of manufacture, or the construction of any useful articles, were cut, the charges in that respect, namely, the character of the timber, has been sufficiently proven. It matters not to what purposes the timber may have been applied after being cut, if converted to the use of the party accused. Selling it for fire-wood or burning it into charcoal would be no defense or excuse for cutting and removing; nor can it be evidence of the worthlessness of the timber cut sufficient to justify it.

In passing upon the fourth section of the act under consideration, the United States circuit court for the district of Oregon, in *United States v. Williams* (18 Fed. Rep., 475, 477), held that it prohibited the cutting of *any* timber upon public lands, except as otherwise provided in said section. The same court, in *United States v. English* (107 Fed. Rep., 867, 869), among other things, said: "The statute is intended to preserve the timber upon the public domain." See, also, *The Timber Cases* (11 Fed. Rep., 81, 82); and *United States v. Lane* (19 Fed. Rep., 910, 911).

Unless a different intention appears, a word used in one part of a statute will bear the same meaning throughout (*Sutherland, Stat. Const., Sec. 255*).

There is nothing in the act indicating that Congress intended that the word "timber," as used in the first section, should be construed to have a meaning different from that in which it is employed in the fourth section; and from the above-quoted decisions, it is seen that the word "timber," as it is employed in that section, is not restricted to such trees as are of greater dimensions than twelve inches in diameter.

Keeping in view the purpose of Congress in enacting the statute, its intention, as expressed in the language employed, the construction placed by the courts upon other statutes on the same subject, and upon other sections of the same act, the Department is of the opinion that the word "timber," as used in the first section of the act under consideration, includes such trees, regardless of their dimensions, as may be used in erecting buildings or irrigation works, constructing railroads, tramways, or canals, building fences or corrals, timbering mining shafts or tunnels, or which may be utilized in the manufacture of any useful article; further, that the land applied for has been shown to be "valuable chiefly for timber," within the contemplation of said section.

Your office decision rejecting the application to purchase is accordingly reversed, and you are hereby directed to proceed in accordance with the views above set forth.

SCHOOL LANDS—OKLAHOMA TERRITORY—ACT OF MAY 4, 1894.

TERRITORY OF OKLAHOMA.

Until laws and regulations for the leasing of school lands in the Territory of Oklahoma are prescribed by the legislature thereof, the authority and duty of deciding all questions in relation thereto are, by the act of May 4, 1894, cast upon a board composed of the governor, secretary and superintendent of public instruction of said Territory, and the assent of the Department is not necessary to give validity to any action that may be taken by said board in relation to the leasing of such lands.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *March 15, 1902.* (G. B. G.)

In a communication of February 24, 1902, from James J. Houston, secretary of the board for leasing school lands in the Territory of Oklahoma, addressed to this Department, it was stated that the town of Luther, a railroad station, in Lincoln county, is platted on forty acres of ground now fully occupied for business and residence purposes, and that no other ground is available for the purposes of the town except school land immediately adjoining it on the east; that the former lessee of this school land has allowed the business men of the town to erect about twenty houses thereon; and that the lessee has since relinquished eighty acres thereof to the Territory. It is further stated that by having this ground platted for townsite purposes and renting the lots, the board can obtain a much larger rental therefrom than by compelling the occupants to vacate it and renting the land for agricultural purposes; and that the citizens of the town of Luther unanimously unite in asking the board to allow a proper amount of this land to be used for townsite purposes. In view of the premises, it is requested that the Secretary of the Interior give his assent to the surveying, platting, and renting of lands under the control of said board for townsite purposes.

This communication was referred to your office February 27, 1902, for report, and under date of March 10, 1902, your office calls the attention of the Department to section 36 of the act of March 3, 1891 (26 Stat., 989, 1043), the regulations of March 19, 1891, thereunder (not reported), and the act of May 4, 1894 (28 Stat., 71), and advises against allowing the request of said board.

The said section 36 of the said act of March 3, 1891, provides:

That the school lands reserved in the Territory of Oklahoma, by this and former acts of Congress, may be leased for a period not exceeding three years for the benefit of the school fund of said Territory by the governor thereof, under regulations to be prescribed by the Secretary of the Interior.

The said regulations of March 19, 1891, provide, among other things, that the governor of said Territory shall execute the leases "according to the legal subdivisions of sections, townships and ranges," which

"shall be forwarded to the Secretary [of the Interior] for his approval before being executed by the governor."

The said act of May 4, 1894, provides that all school lands in said Territory—

may be leased under such laws and regulations as may be hereafter prescribed by the legislature of said Territory; but until such legislative action the governor, secretary of the Territory, and superintendent of public instruction shall constitute a board for the leasing of said lands under the rules and regulations heretofore prescribed by the Secretary of the Interior, for the respective purposes for which the said reservations were made, except that it shall not be necessary to submit said leases to the Secretary of the Interior for his approval.

It would seem that this last-named act deprives the land department of the government of any further jurisdiction in the matter of the leasing of these lands. If it is not necessary to submit these leases when made for the approval of the Secretary of the Interior, it is not apparent in what way he can exercise a supervisory control over the matter. Whatever may have been the purpose of the act of May 4, 1894, its legal effect is, until such time as the legislature of the Territory may prescribe laws and regulations for the leasing of these lands, to cast upon the governor, secretary and superintendent of public instruction, as a board, the authority and duty of deciding all questions in relation thereto which, under the said act of March 3, 1891, and said regulations, devolved upon the Secretary of the Interior. It follows that whatever action the board may determine upon in this matter, the assent of this Department is not necessary to give validity thereto.

Your office will forward to the proper officer of the Territory a copy of this communication.

REPAYMENT—RAILROAD GRANT—INDEMNITY WITHDRAWAL.

HENRY S. BRIDGE.

The indemnity withdrawal made March 22, 1867, on account of the grant of July 27, 1866, for the Southern Pacific Railroad Company, was in violation of law and without effect, and did not operate to reserve the lands covered thereby from entry; hence a homestead entry of lands while included in the withdrawal was not, for that reason, an entry erroneously allowed that could not be confirmed, and repayment of the fees and commissions paid by the entryman is not authorized.

Acting Secretary Ryan to the Commissioner of the General Land
(W. V. D.) *Office, March 21, 1902.* (C. J. G.)

December 10, 1901, your office submitted to the Department, with favorable recommendation, the application of Henry S. Bridge for repayment of the fee and commissions paid by him on homestead entry for the SE. $\frac{1}{4}$ of Sec. 25, T. 24 S., R. 17 E., Visalia, California, land district.

December 28, 1901, the application was approved, without reference to the law division, and referred back to your office for settlement. It was subsequently submitted by your office to the Auditor for the Interior Department to be certified for payment.

February 3, 1902, the Auditor, by letter of that date, returned the claim here for reconsideration with the statement that its allowance does not appear to be authorized by the act of June 16, 1880 (21 Stat., 287). This letter was referred to your office for report. Such report dated February 11, 1902, has been received, in which your office adheres to its former recommendation in the premises.

The land in question is in an odd section within the indemnity limits of the grant made by the act of July 27, 1866 (14 Stat., 292), for the Southern Pacific Railroad Company, and was included in the withdrawal made March 22, 1867, for the benefit of said company. This indemnity withdrawal was revoked by order of August 15, 1887, at the same time other indemnity withdrawals were revoked (6 L. D., 84, 93). Prior to such revocation, to wit, on January 8, 1886, Bridge made his said homestead entry, and November 12, 1886, John Wyruck filed affidavit of contest alleging abandonment. The entry was finally canceled upon this contest March 10, 1888, the entryman making default at the hearing. No appeal was taken and Wyruck was allowed to enter the land.

It appears that the claim for repayment was at first denied by your office on the ground that, while admitting that the entry was erroneously allowed, yet inasmuch as the indemnity withdrawal was subsequently revoked, every obstacle to the confirmation of said entry was thereby removed, and the same might have been confirmed if the entryman had complied with the law. Upon further consideration on motion for review, and conformably to the rule announced in the case of *Barbour v. Wilson et al.* (on review, 28 L. D., 61, 70), namely:

In the administration of the public land laws it is uniformly and wisely held that an entry of land held in reservation or for other reasons not subject to entry, made and maintained in good faith under color or claim of right will, if the land has since become subject to that class or character of entry, be permitted to remain intact as having attached when the land became subject to entry, if there be no adverse claim—

your office revoked its former decision and approved the claim for repayment, on the ground that by the intervention of the adverse right of Wyruck prior to the order of August 15, 1887, it became impossible for the entry of Bridge to have "attached when the land became subject to entry." And in your office report of February 11, 1902, it is further insisted that taking the facts as they actually existed there never was a time when Bridge's entry was in a condition to have been confirmed. It is pointed out by the Auditor for the Interior Department, among other things, that the entry was canceled for

abandonment long after the land was restored to entry; that if Wyruck had any adverse right it was acquired after the allowance of Bridge's entry and while the land was reserved for railroad purposes; and that if the entry was erroneously allowed because the land was so reserved, then it could not be lawfully contested and an adverse right acquired while the land was in that status.

Without specifically considering the matters presented by your office decision and report, and the letter of the Auditor for the Interior Department, it is sufficient to say that it has been repeatedly held by the Department that the indemnity withdrawal made on account of the grant of July 27, 1866, for the Southern Pacific Railroad Company was in violation of law and without effect. Such withdrawal therefore conferred no right upon the company, nor did it operate to reserve the land from entry. Bridge's homestead entry was, therefore, properly and not erroneously allowed and might have been confirmed if he had complied with the requirements of the law under which it was made. See cases of *Southern Pacific R. R. Co. v. Kanawyer* (23 L. D., 500); *State of California v. Southern Pacific R. R. Co.* (27 L. D., 542); and *Hewitt v. Schultz* (180 U. S., 139). In this view the application for repayment should have been, and hereby is, denied.

Your office will duly notify the Auditor for the Interior Department of this decision.

RAILROAD GRANT—INDEMNITY SELECTION—ERRONEOUS DESCRIPTION.

SOUTHERN PACIFIC R. R. Co. v. BRUNS.

The statement in a patent as to acreage of the land conveyed must yield to the terms of description therein employed.

In case of the erroneous patenting to a railroad company, as indemnity, of a tract of land for the selection of which no previous application had been made, the company will be afforded an opportunity to specify a basis therefor and the patent allowed to stand.

Where a fractional section in California has been described differently under the original survey of April 27, 1869, and the Carpenter survey of April 6, 1894, and selection thereof is made by a railroad company, as indemnity, under the description given in the original survey, such selection should be considered as a selection of the tract as described under the later survey, and patent should issue accordingly.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *March 26, 1902.* (F. W. C.)

The land involved in this case was by the original survey of T. 30 N., R. 21 E., M. D. M., Visalia land district, California, made April 27, 1869, returned as a portion of the N. $\frac{1}{2}$ of Sec. 12, and was, by the Carpenter survey of said township, approved April 6, 1894, returned

as fractional section 1 containing 206.47 acres divided as follows: Lots 1, 2, 3 and 4, S. $\frac{1}{2}$ SE. $\frac{1}{4}$ and S. $\frac{1}{2}$ SW. $\frac{1}{4}$.

According to the survey of April 27, 1869, section 1 was returned as fractional containing 641.40 acres, and on February 17, 1892, the Southern Pacific Railroad Company, under its grant made by act of June 27, 1866 (14 Stat., 292), made indemnity selection of said fractional section 1 containing 641.40 acres.

The Carpenter survey of 1894 preserves the exact location of all disposals under the 1869 survey of this township without regard to the section lines as established under the Carpenter survey, designating such disposals as lots numbered respectively from 37 to 117 inclusive. Fractional section 1 under the survey of 1869 containing 641.40 acres, is returned by the Carpenter survey as lot 37, and includes land which would fall in sections 1 and 2, according to the lines of that survey, if made as original surveys are usually made.

January 4, 1896, nearly two years after the approval of the Carpenter survey, this Department approved a clear list of selections submitted by your office on account of the grant of July 27, 1866, to the Southern Pacific Railroad Company, which list includes, according to its own terms, all of fractional section 1, T. 30 S., R. 21 E., containing 641.40 acres, and patent issued upon said approved list January 25, 1896, the description in the patent following that contained in the approved list, being "all of fractional section one containing six hundred and forty-one and forty hundredths acres." This patent made no reference to either of the surveys of this township and contains many lands in other townships.

On December 30, 1899, Carl A. Bruns filed in the local office at Visalia, under the act of June 4, 1897 (30 Stat., 36), his application to select lots 1, 2, 3 and 4, S. $\frac{1}{2}$ SE. $\frac{1}{4}$ and S. $\frac{1}{2}$ SW. $\frac{1}{4}$ of Sec. 1, T. 30 N., R. 21 E., M. D. M., in lieu of certain described lands situate within the Sierra forest reserve, which application and accompanying proofs were forwarded with register's letter of January 17, 1900.

On January 10, 1900, the Southern Pacific Railroad Company filed in the local office an application to select the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of said section 1, in lieu of certain described land situate within the primary limits of its grant, which application was rejected by the local officers for conflict with the prior application by Bruns, from which action the railroad company appealed.

Your office decision of November 22, 1900, considered the applications by Bruns and the Southern Pacific Railroad Company and rejected both applications upon the ground that the patent to the railroad company issued on January 25, 1896, included the land embraced in said applications. Thereafter, to wit, on December 15, 1900, you recalled the decision of November 22, 1900, permitted the selection by Bruns to stand and affirmed the action of the local officers in rejecting

the selection presented by the railroad company on January 10, 1900, holding, in effect, that the railroad patent of January 25, 1896, did not embrace the land covered by said applications, because it was land added to section 1 by the survey of 1894. From said decision the Southern Pacific Railroad Company has appealed to this Department.

It becomes first necessary to determine to what lands title was passed to the railroad company in section 1, T. 30 N., R. 21 E., M. D. M., by the patent of January 25, 1896.

Said patent conveyed title to "all of fractional section one," within said township.

This language is clear and unambiguous and the only land meeting the description "all of fractional section one," according to plat of survey of 1894 which was the then accepted plat in use governing the disposal of public lands in this township, is the land now in question.

As before shown, the land returned as fractional section one by the survey of 1869, was returned by the survey of 1894 as lot 37, and includes land within the section lines of what would be both sections one and two, according to the survey of 1894, if made as original surveys are usually made. The statement of acreage in the patent must yield to the other and more definite terms of description there employed.

It results that a tract was patented to the railroad company for the selection of which no previous application had been made and that the tract selected by the company in 1892 has not been patented. Consequently, a basis for the patented tract has not been assigned. While the patenting of a tract not previously selected was irregular the effect of the patent is unimpaired, and you are directed to call upon the company to specify from the lands lost within the place limits of its grant a basis for the land so irregularly patented.

The selection made February 17, 1892, of all of fractional section one containing 641.40 acres, should have been considered, after the Carpenter survey, as a selection of lot 37 of township 30 N., R. 21 E., M. D. M., and said selection will be so treated and passed to patent unless, upon consideration by your office, a sufficient objection appears thereto.

The Department concurs in the views expressed in your office decision of November 22, 1900, and therefore reverses your office decision of December 15, 1900, appealed from.

APPLICATION TO MAKE ENTRY—FINAL PROOF.

CIRCULAR.

Registers and Receivers, United States Land Offices.

GENTLEMEN: Your attention is called to the provisions of an act of Congress entitled: "An act to amend section twenty-two hundred and ninety-four of the Revised Statutes of the United States," approved March 11, 1902 (Public No. 39), a copy of which is hereto attached.

Under its provisions all affidavits, proofs, and oaths of any kind thereafter made by applicants and entrymen under the homestead, preëemption, timber-culture, desert-land, and timber and stone acts, may, in addition to those now authorized to take such affidavits, proofs, and oaths, be made before any United States commissioner or commissioner of the court exercising federal jurisdiction in the territory or before the judge or clerk of any court of record in the land district in which the lands are situated.

In case the affidavits, proofs, and oaths hereinbefore mentioned be taken out of the county in which the land is located the applicant must show by affidavit that it was taken before the nearest or most accessible officer qualified to take said affidavits, proofs, and oaths in the land districts in which the lands applied for are located.

Such showing by affidavit need not be made, however, in making *final proof* if the proof be taken in the town or city where the newspaper is published in which the final proof notice is printed.

Very respectfully,

BINGER HERMANN,
Commissioner.

Approved March 26, 1902:

E. A. HITCHCOCK,
Secretary.

(PUBLIC—No. 39.)

AN ACT to amend section twenty-two hundred and ninety-four of the Revised Statutes of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section twenty-two hundred and ninety-four of the Revised Statutes of the United States be, and the same is hereby, amended so as to read as follows:

"Sec. 2294. That hereafter all affidavits, proofs, and oaths of any kind whatsoever required to be made by applicants and entrymen under the homestead, preëemption, timber-culture, desert-land, and timber and stone acts, may, in addition to those now authorized to take such affidavits, proofs, and oaths, be made before any United States commissioner or commissioner of the court exercising federal jurisdiction in the territory or before the judge or clerk of any court of record in the land district in which the lands are situated: *Provided*, That in case the affidavits, proofs, and oaths hereinbefore mentioned be taken out of the county in which the land is located the applicant must show by affidavit, satisfactory to the Commissioner of the General Land Office, that it was taken before the nearest or most accessible officer qualified to take said affidavits, proofs, and oaths in the land districts in which the lands applied for are located; but such showing by affidavit need not be made in making final proof if the proof be taken in the town or city where the newspaper is published in which the final proof notice is printed. The proof, affidavit, and oath, when so made and duly subscribed, shall have the same force and effect as if made before the register and receiver, when transmitted to them with the fees and commissions allowed and required by law. That if any witness making such proof, or any applicant making such affidavit or oath, shall knowingly, willfully, or corruptly swear falsely to any

material matter contained in said proofs, affidavits, or oaths he shall be deemed guilty of perjury, and shall be liable to the same pains and penalties as if he had sworn falsely before the register. That the fees for entries and for final proofs, when made before any other officer than the register and receiver, shall be as follows:

"For each affidavit, twenty-five cents.

"For each deposition of claimant or witness, when not prepared by the officer, twenty-five cents.

"For each deposition of claimant or witness, prepared by the officer, one dollar.

"Any officer demanding or receiving a greater sum for such service shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by a fine not exceeding one hundred dollars."

Approved, March 11, 1902.

CONTEST—AFFIDAVIT—NOTICE—PRACTICE.

HOCHWART *v.* MARESH.

An affidavit of contest against a desert-land entry, in which it is alleged that the entryman "has failed to make yearly proof for the first year as required by law," states a sufficient cause of action.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *March 28, 1902.* (J. R. W.)

Jacob Hochwart appealed from your office decision of November 11, 1901, dismissing his contest of John Maresh's desert-land entry for the S. $\frac{1}{2}$ NW. $\frac{1}{4}$ and N. $\frac{1}{2}$ SW. $\frac{1}{4}$ Sec. 9, T. 4 N., R. 37 E., Blackfoot, Idaho.

February 20, 1899, Maresh made entry, giving his address Market Lake, Idaho. September 7, 1900, Hochwart filed an affidavit, alleging, as the sole ground of contest, "that the said Maresh has failed to make yearly proof for the first year as required by law." There was an affidavit for service by publication, and substituted service was authorized by the local office, but no valid service was made for the reason that the record failed to show any registered mail notice to the entryman's record address, or to Ord, Nebraska, his last known address, instead of which there was a registered mail notice to him at Lincoln, Nebraska, which was returned unclaimed. The record also failed to show any posting of notice in the local office.

At the hearing contestant appeared and offered proof. The local office recommended cancellation of the entry. Your office reversed the action of the local office and held that the affidavit did not state a cause of action, and that the service was insufficient to confer jurisdiction, and dismissed the contest.

The act of March 3, 1877 (19 Stat., 377), as amended March 3, 1891 (26 Stat., 1095), by section 5, among other things, provides that:

If any party who has made such application shall fail during any year to file the testimony aforesaid the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be canceled.

The Department held in *Andrew Clayburg* (20 L. D., 111, 115), that:

This statute makes the failure to file this testimony during any year as the ground upon which his entry may be canceled, and in every case where there is a total failure to file such testimony during any year after a desert declaration has been filed, upon information of such failure your office clearly has full and complete jurisdiction to proceed, under the rules of practice, against such entry and to finally cancel the same for such failure.

Your office decision, therefore, erred in holding that the affidavit stated no cause of action.

The service was insufficient to confer jurisdiction over the defendant. *Christner v. Metz* (29 L. D., 693); *Parker v. Castle* (4 L. D., 84). But the contest should not have been dismissed. The cause should have been remanded for further proceedings.

Your office decision vacating the action of the local office is affirmed.

LOCATION AND ASSIGNMENT OF MILITARY BOUNTY-LAND WARRANTS.

CIRCULAR.

Circular of February 18, 1896 (27 L. D., 218), respecting the location and assignment of military bounty-land warrants, re-approved and reprinted in pamphlet form, March 28, 1902, without change except the substitution of rule 11 as amended July 6, 1898 (27 L. D., 234).

REPAYMENT—DESERT-LAND ENTRY.

WILLIAM W. BRANDT.

A desert-land entry made under the act of March 3, 1877, but not completed, by final proof, until after the passage of the amendatory act of March 3, 1891, is governed, so far as the price to be paid for the land entered is concerned, by the law in force at the time the entry was made.

Section 2357, R. S., fixing the price of alternate even-numbered sections within railroad limits at \$2.50 per acre, was not modified or repealed by the desert-land act of 1877; hence an entry allowed under said act, prior to the passage of the amendatory act of 1891, at the rate of \$1.25 per acre, was erroneously allowed and could not be confirmed, on the payment of such price, and the entryman is therefore entitled to repayment.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *April 3, 1902.* (C. J. G.)

Your office has transmitted, with favorable recommendation, the application of William W. Brandt for repayment of the money paid by him upon filing declaratory statement, under the desert-land act of March 3, 1877 (19 Stat., 377), for all of Sec. 10, T. 4 N., R. 7 W., Los Angeles, California, land district.

The land is within the overlap of the grant made by the act of July 27, 1866 (14 Stat., 292), to the Atlantic and Pacific Railroad Company—*forfeited by the act of July 6, 1886 (24 Stat., 123)—with that made by the act of March 3, 1871 (16 Stat., 573), to the Southern Pacific Railroad Company, branch line.* At the time of filing his declaratory statement, to wit, April 4, 1887, Brandt paid the sum of \$160, or twenty-five cents per acre. His entry was canceled February 16, 1891.

The repayment act of June 16, 1880 (21 Stat., 287), provides:

In all cases where desert land entries have been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry

Brandt claims repayment upon the ground that the land, being an alternate even-numbered section within the limits of a railroad grant, could not be disposed of at less than \$2.50 per acre, and that his entry being allowed at \$1.25 per acre was therefore one which was erroneously allowed and could not be confirmed.

In most, if not in all, the acts making grants of public lands to aid in the construction of railroads, there was a provision which is in substance found in the proviso of section 2357 of the Revised Statutes (act of March 3, 1853, 10 Stat., 245), as follows:

That the price to be paid for alternate reserved lands along the line of railroads within the limits granted by any act of Congress, shall be two dollars and fifty cents per acre.

Up to the time of this revision it was the policy of the government to hold all alternate reserved sections along the lines of land-grant railroads at a price not less than double the minimum price of public lands. It will be observed that the above proviso is not restricted in its scope but applies to all alternate reserved lands within the limits of railroad grants made by any act of Congress, irrespective of any distinction as to the class or character of such lands, the only distinction being one of price based solely on the matter of location. This is the law with respect to such lands that was in force at the date of the passage of the desert-land act of 1877. The latter act was approved on the 3rd of March, and on the 12th of the same month circular instructions were issued (4 C. L. O., 22) requiring local officers, after proof of the desert character of the land, the filing of the proper declaration, and the payment of twenty-five cents per acre, to issue a certificate to the declarant, stating, among other things, that if within three years therefrom he should reclaim the land as required by the act and pay an additional sum of one dollar per acre, he should be entitled to a patent. In this respect the instructions followed the language of the act, no reference being made in either to section 2357 of the Revised Statutes, or to the substance thereof. The act of 1877 itself in terms applied to "any desert land," no exception being made therein of land of that description situated within the limits of railroad grants. It

was presumably due to this fact that no exception as to price was made in the circular instructions referred to, the act of 1877 apparently being construed and administered as modifying or repealing *pro tanto* section 2357 of the Revised Statutes. The practice thus initiated of charging but \$1.25 per acre for desert lands, regardless of location, stood without interruption until the circular of June 27, 1887 (5 L. D., 708), was issued. Prior to that date, therefore, the uniform construction of the desert-land act, as well as the practice thereunder, was that lands entered under said act should be paid for in full at the rate of \$1.25 per acre whether within or without the limits of a railroad grant (6 L. D., 145). It was during that period that Brandt filed his declaratory statement, he being thus required to pay at the rate of only \$1.25 per acre for the land embraced therein. Section three of the circular of June 27, 1887, read:

The price at which lands may be entered under the desert-land act is the same as under the preëemption law, viz: single minimum lands at \$1.25 per acre, and double minimum lands at \$2.50 per acre (Section 2357 U. S. Revised Statutes).

From the date of this circular to the passage of the amendatory act of March 3, 1891 (26 Stat., 1095), the desert-land act of 1877 "was administered upon the theory that it did not modify or conflict with section 2357 of the Revised Statutes, and therefore did not include alternate sections reserved to the United States along the line of land-grant railroads, the price for which was fixed at \$2.50 per acre." John Cameron (7 L. D., 436); Daniel G. Tilton (8 L. D., 368); Annie Knaggs (9 L. D., 49); Cyrus Wheeler (9 L. D., 271); Hugh Reese (10 L. D., 541); and Henry L. Davis (12 L. D., 632). It was not ruled in these cases that lands within the limits of a railroad grant could not be entered under the desert-land act, but simply that they could not be entered for the price named in the act, \$1.25 per acre, but were subject to the general provision for double price. *United States v. Ingram* (172 U. S., 327).

The amendatory act of March 3, 1891, *supra*, provided that the price of desert lands should be \$1.25 per acre and repealed all prior laws in conflict therewith, and this was construed to thereafter authorize desert-land entries at that price "without regard to the situation of the land with relation to the limits of railroad grants" (14 L. D., 74). In the case of Robert J. Gardinier (19 L. D., 83), it was held that this provision of the act was applicable to a desert-entry of land within railroad limits made prior to said act but not perfected until thereafter. A similar ruling was made in the case of Kate G. Organ (20 L. D., 406), but these decisions were subsequently changed in view of the decision of the supreme court in the case of *United States v. Healey* (160 U. S., 136), wherein said court declined to accept the ruling in Gardinier's case and Organ's first case. See cases of Jedediah F. Holcomb (22 L. D., 604), Frederick W. Lawrence

(23 L. D., 450), and Kate G. Organ (25 L. D., 231). The entries in the cases of Holcomb and Lawrence were made prior to the circular of June 27, 1887, yet notwithstanding this fact it was held that \$2.50 per acre was the proper price, the lands being in alternate even-numbered sections within railroad limits; and this notwithstanding the further fact that it was expressly declared in said circular that nothing therein would be construed to have a retroactive effect where the regulations of the Department in force at the date of entry were complied with, and was also expressly declared in the instructions of September 15, 1887 (6 L. D., 145), that where the initial entry of double minimum land was made prior to the promulgation of the circular of June 27, 1887, the entryman should be required to pay but \$1.25 per acre for the land so entered.

In the decision of the supreme court in Healey's case, after referring to many of the decisions, circulars, etc., cited herein, and the rules of interpretation as applied to the acts of 1877 and 1891, it is said:

Giving effect to these rules of interpretation, we hold that Secretaries Lamar and Noble properly decided that the act of 1877 did not supersede the proviso of section 2357 of the Revised Statutes, and therefore did not embrace alternate sections reserved to the United States by a railroad land grant.

It results that prior to the passage of the act of 1891, lands such as those here in suit, although within the general description of desert lands, could not properly be disposed of at less than \$2.50 per acre. Was a different rule prescribed by that act in relation to entries made previously to its passage?

The court answered the question as follows:

We are of opinion that the act of 1891 did not authorize the lands in dispute to be sold at \$1.25 per acre, where, as in this case, the proceedings to obtain them were begun before its passage.

* * * * *

It is true that the claimant, at his option, could perfect his claim, thus initiated, and have the lands patented under the act of 1877, as amended by that of 1891, so far as the latter act was applicable to the case. But this did not mean that land entered under the act of 1877, when the price was \$2.50 per acre, could be patented, after the passage of the act of 1891, upon paying only \$1.25 per acre.

* * * * *

We are of opinion that cases initiated under the original act of 1877, but not completed, by final proof, until after the passage of the act of 1891, were left by the latter act—at least as to the price to be paid for the lands entered—to be governed by the law in force at the time the entry was made. So far as the price of the public lands was concerned, the act of 1891 did not change, but expressly declined to change, the terms and conditions that were applicable to entries made before its passage. Such terms and conditions were expressly preserved in respect of all entries initiated before the passage of that act.

As finally interpreted by the Department and the supreme court, section 2357 of the Revised Statutes, fixing the price of alternate even-numbered sections within railroad limits at \$2.50 per acre, was not modified or repealed by the desert-land act of 1877. On the contrary,

it was held that it is clearly possible to give the fullest effect to both acts. Therefore, the price for such sections, where the entry was made prior to the act of March 3, 1891, remained the same after the passage of the act of 1877 as before. In the view herein outlined Brandt's entry was erroneously allowed at the rate of \$1.25 per acre, because made for land which the law specifically declared was to be disposed of at \$2.50 per acre, and could not be confirmed upon payment of the price contemplated by the land officers and entryman when the entry was made. It is not believed that a confirmation possible only by the payment of a doubled price not contemplated by either land officers or entryman at the time of entry, and which could not have been reasonably contemplated at that time in the light of the then existing circulars and practice of the land department, is a confirmation which, under the statute, will preclude repayment to the entryman. The recommendation of your office in this case is accordingly approved and repayment will be allowed as applied for.

HAWAII—RIGHT OF WAY—EASEMENT.

OPINION.

The authority conferred by section 169 of the Civil Laws of Hawaii upon the territorial officers, to lease, sell, or otherwise dispose of the public lands of said territory, includes authority to grant an easement upon, over, and across them, for the purpose of constructing, maintaining, and operating all works necessary to supply water for irrigating lands, developing power, and for domestic purposes; and by sections 186 and 193 of said civil laws said officers are expressly authorized to grant a right to use earth, rock and timber upon adjacent public lands for the purpose of constructing, maintaining and repairing such improvements. The power to make such grants for the purposes named being conferred upon the officers of the territory by the local laws, which Congress by express direction has continued in force, and the power in no way depending upon the action of the Department of the Interior, it is not necessary that an application for the exercise thereof should be approved by the Secretary.

Assistant Attorney-General Van Devanter to the Secretary of the Interior,
April 4, 1902. (A. C. C.)

You have referred to me, for consideration and appropriate action, the application of James Walter Jones of Honolulu, Hawaii, made to the officers of the Territory of Hawaii, which, if granted by them, would create an easement upon a portion of the public lands in said territory, coupled with a right to take from adjacent lands during the existence of the easement, earth, rock and timber—the easement and right to be used for the purpose of constructing, maintaining, and operating all works necessary to supply water for irrigating lands, developing power, and for domestic purposes.

The applicant proposes to pay to the Territory, as compensation for the granting of the easement sought, a yearly sum ranging from \$1000 to \$2500, and further proposes to furnish and sell water for domestic and agricultural purposes to those who are acquiring or leasing public lands and to owners of private lands, the rates therefor to be uniform and to accord to certain specified standards.

It seems that the officers of the territory are willing, and deem it advisable for the best interests of the territory, to grant the application, but have withheld final action pending consideration of the application by this Department, which is requested by them.

Two questions are presented for consideration: (1) Have the Territorial officers power to grant an easement upon and over public lands of the territory for the purposes named in the application, and, if so, may they authorize the grantee thereof to take from adjacent land during the life of the easement, earth, rock and timber, the same to be used in the construction, maintenance and repair of the improvements to be erected? (2) Is it necessary for this Department to approve the application?

By the joint resolution of July 7, 1898 (30 Stat., 750), accepting the cession of the Hawaiian Islands, it was provided that—

The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands, but the Congress of the United States shall enact special laws for their management and disposition.

Section 73 of the act of April 30, 1900 (31 Stat., 141, 154), providing a government for the Territory of Hawaii, continued in force, with certain modifications to conform to changed conditions, the laws of Hawaii relating to public lands which were in existence at the date of the passage of the aforesaid joint resolution. Among the provisions thus modified and continued in force are the following, being a part of sections 169 and 193 and subdivision 6 of section 186 of the Civil Laws of Hawaii of 1897:

Sec. 169. The commissioner of public lands, by and with the authority of the governor and attorney general, shall have power to lease, sell or otherwise dispose of the public lands, and other property, in such manner as he may deem best for the protection of agriculture, and the general welfare of the territory, subject, however, to such restrictions as may, from time to time, be expressly provided by law.

Sec. 186, Sub. 6. A "land license" means a privilege granted by the territory for the occupation of land for certain special purposes, such as the cutting and removal of timber, the removal of soil, sand, gravel or stone.

Sec. 193. The commissioner of public lands shall have power from time to time to establish forms of all instruments necessary for carrying out this act, . . . and to make, alter and revoke rules and regulations . . . for the granting of land licenses, etc.

The above are the only provisions in the laws of said territory under which it may be claimed that the power to grant the authority requested exists. So far as I am informed these statutory provisions

have not received judicial interpretation, but it has been shown that, prior to the establishment of the provisional government of Hawaii, the officers of the Kingdom, charged with the administration of the public land laws, and under provisions similar to the above, granted applications of the character under consideration. Further, that the executive officers of the Republic, under the aforesaid provisions, have heretofore claimed and exercised the same power, and that since annexation the territorial officers have granted similar applications. The construction thus given to said provisions, and to provisions of similar import, is entitled to respectful consideration, and should not be disregarded without good reasons. *United States v. Moore* (95 U. S., 760, 763).

In determining the extent of the power intended to be conferred upon the officers named in said section 169, two questions are presented for consideration, viz: (1) Will the establishment of works to supply water for irrigation, power, and domestic purposes in the Hawaiian Islands protect agriculture therein, or conduce to the general welfare of the territory? (2) Is the power to grant an easement included within the power given to lease, sell, or otherwise dispose of the public lands?

It is well known that a large part of the islands is arid or semi-arid, and incapable of cultivation without irrigation. The histories of other countries, and the development of our own, demonstrate that the establishment, maintenance, and operation of irrigation works in arid and semi-arid regions promote and protect agriculture and enhance the general welfare of the State. This fact has long been recognized by Congress and by the people of the Rocky Mountain region and Pacific slope, as is evidenced by constitutional provisions adopted, and congressional, State, and territorial legislation enacted, to promote, encourage, and protect irrigation enterprises; it has been recognized by the courts, as will appear by reference to judicial approval, construction, and application of such laws; it has been recognized by the law-making power of Hawaii, as will be seen in its laws relative to the exercise of the right of eminent domain, where power is conferred to take private property for the purpose of "constructing dams, reservoirs, canals, ditches, flumes," etc.

It is now universally conceded that an enterprise which has for its object and purpose, and which is calculated, to reclaim from their desert character and bring under cultivation, lands situated in an arid or semi-arid region, is an enterprise that promotes agriculture and adds to the wealth of the community; and it has been too long, and is now too well, settled, by high judicial authority, to admit of discussion, that water works used for developing power or for supplying water for domestic purposes are for the benefit of the public. It follows that, under said section 169, the officers therein named are given

the power to lease, sell, or otherwise dispose of public lands for the construction, maintenance, and operation of such works as are mentioned in the application.

The power to encumber the public lands by the granting of an easement, while not in specific terms given by the section, is clearly included in the words employed. As is plainly evident, the purpose of the section is to protect and promote important and beneficial public objects, and should be construed liberally in favor of the public interests, if this can be done without doing violence to its terms. (Sutherland, Stat. Const., Sec. 443.) Applying this well settled rule of statutory construction to the words employed, there can be no doubt that the legislature intended to confer the minor power of granting an easement when it invested the officers of the territory with authority to convey the full title to public lands, coupled with authority *to lease or otherwise dispose* thereof. This view of the meaning of the words employed is strengthened by judicial decisions (as will be seen by reference thereto) wherein were construed terms of similar import in the Federal Constitution and in acts of Congress.

Art. 4, Sec. 3, of the Federal Constitution provides—

That Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

In passing upon this provision the supreme court, in *United States v. Gratiot et al.* (14 Pet., 526, 537), held that it authorized Congress to enact laws for the leasing of the public domain.

By act of March 3, 1819 (3 Stat., 520), the Secretary of War was authorized, under the direction of the President, to cause to be *sold* certain military sites. By a subsequent act, passed April 28, 1828 (4 Stat., 264), the President was authorized to sell certain lands which had been conveyed to the government for forts, arsenals, dock-yards, lighthouses, or any like purpose, etc.

In November, 1838, the Secretary of War entered into a contract with the President of the Baltimore and Ohio Railroad Company, by the terms of which authority, for an indefinite period, was granted to the company, among other things, to construct its railroad over and across lands of the government included in the site of the Harper's Ferry Military Arsenal. Under said agreement the company entered upon and constructed its line of railroad over and across said lands, and operated said railroad continuously thereafter. Subsequently an action was instituted by the government against the company to cancel the aforesaid agreement, principally upon the ground of want of power in the Secretary of War to enter into the same. The court dismissed the bill, holding that the Secretary of War "being invested with authority to dispose of it [the site] by grant in fee, all minor powers over the property are necessarily implied;" and that the railroad company, as well as the public through it, had "acquired an

easement in the property, so long as it continues to use it for the purposes granted." *United States v. Baltimore and Ohio Railroad Company* (1 Hughes, 138, S. C.; 24 Fed. Cas., 973, 975).

Taking into consideration the language employed in the said section 169 and the rule of construction applicable to the same, I am of opinion that the power conferred thereby to lease, sell, *or otherwise dispose of* the public lands includes authority to grant an easement upon, over, and across them.

An easement which is granted for the purpose of erecting and maintaining a public or *quasi* public improvement necessarily carries with it the right to remove so much of the soil, rock, and timber from the land subject thereto as may be necessary in the construction and maintenance of such improvement, but ordinarily such easement does not confer the right to indiscriminately use soil, rock, and trees from adjacent lands for the purpose of construction, maintenance, and repair of such improvement.

But it is clear to me that by sections 186 and 193 of said civil laws, the territorial officers are expressly authorized to grant a right to use earth, rock and timber upon adjacent public lands for the purpose of constructing, maintaining and repairing the improvements agreed to be erected by the applicant.

While I recognize that a "license," in its restricted legal sense, means a liberty or privilege upon the lands of another, to be enjoyed at the will of the party who gives it, and that the privilege here sought is not intended to be thus revocable, yet a license, in its enlarged sense, may include a privilege coupled with an interest, in which case it is not revocable at the will of the licensor.

This enlarged sense was evidently intended by the legislature of Hawaii to be included in the term "license" as used in the statutes. After defining, in section 186, what a "land license" is, the legislature, by section 193, conferred upon the commissioner of public lands power to make rules and regulations for the granting of the same; and in section 198, subdivision 4, recognizes that contracts may be made respecting "licenses, or other disposition of public lands." The employment of the words "granting" and "contracts" relative to "land licenses," shows that the legislature contemplated that such licenses might be issued coupled with an interest in the grantee.

The power to grant the authority asked is conferred upon the officers of the territory by the local laws which Congress, by express direction, has continued in force, and the exercise of the power in no way depends upon the action of this Department; hence, it is not necessary that the application should be approved by you.

In the application it is conditioned, among other things, that the privilege asked for, if granted, shall, within five years, be surrendered to the territory, and when so surrendered be immediately issued to a

corporation to be formed for the purpose of owning, maintaining, and operating said works. I do not feel called upon to say whether or how such an easement or privilege as is here sought may be transferred or conveyed to another, but I do feel constrained to say that the latter part of this provision is objectionable. The present officers can not bind their successors or Congress in that way.

I am of the opinion, and so advise you, that the privileges requested by the applicant are within the power of the officers of the territory to grant, and that it is not necessary for you to approve the application.

Approved, April 4, 1902:

E. A. HITCHCOCK, *Secretary*.

EXECUTION OF AFFIDAVITS, PROOFS AND OATHS BEFORE DEPUTY
CLERKS—ACT MARCH 11, 1902.

INSTRUCTIONS.

Where deputy clerks are duly empowered by congressional, State or territorial laws to perform the duties of clerks of courts of record, all affidavits, proofs, and oaths of any kind whatsoever required to be made by applicants and entrymen under the homestead, preëmption, timber-culture, desert-land, and timber and stone acts, may be made before such deputies with like effect as though made before their principals.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *April 12, 1902.* (A. C. C.)

January 3, 1902, your office addressed a communication to the Department, from which it appears that it has long been the practice of your office and the local offices to accept affidavits and proofs executed before deputy clerks of courts in cases wherein the public land laws authorize their principals to administer such oaths and take such proofs. The question is presented, whether there is any warrant in law for the practice named.

In specific terms Congress declared, in the act of May 26, 1890 (26 Stat., 121), in amending and re-enacting section 2294, Revised Statutes, "that proof of settlement . . . and all other affidavits required to be made under the homestead, pre-emption, timber-culture and desert-land laws, may be made before . . . clerk of any court of record of the county or parish in which the lands are situated," etc. It is also declared in the act of March 11, 1902 (Public, No. 39), in again amending and re-enacting said section 2294—

That hereafter all affidavits, proofs, and oaths of any kind whatsoever required to be made by applicants and entrymen under the homestead, pre-emption, timber-culture, desert-land, and timber and stone acts, may, in addition to those now authorized to take such affidavits, proofs, and oaths, be made before any United States com-

missioner or commissioner of the court exercising federal jurisdiction in the territory or before the judge or clerk of any court of record in the land district in which the lands are situated: *Provided*, That in case the affidavits, proofs, and oaths hereinbefore mentioned to be taken out of the county in which the land is located the applicant must show by affidavit, satisfactory to the Commissioner of the General Land Office, that it was taken before the nearest or most accessible officer qualified to take such affidavits, proofs, and oaths in the land districts in which the lands applied for are located; but such showing by affidavit need not be made in making final proof if the proof be taken in the town or city where the newspaper is published in which the final proof notice is printed. The proof, affidavit, and oath, when so made and duly subscribed, shall have the same force and effect as if made before the register and receiver, when transmitted to them with the fees and commissions allowed and required by law.

Every clerk of a court of record within the description here given has under this legislation full authority to administer the oaths required to be made by applicants and entrymen under the homestead, pre-emption, timber-culture, desert-land, and timber and stone acts, irrespective of whether the congressional, State or territorial laws from which his general powers are derived clothe him with any authority to administer oaths.

Section 1 of the Revised Statutes provides that, in determining the meaning of any act of Congress, etc.,—

reference to any officer shall include *any person authorized by law* to perform the duties of such officer, unless the context shows such words were intended to be used in a more limited sense.

It is clearly manifest that the purpose of Congress in permitting applicants for and entrymen of public land to make the required oaths and affidavits before a clerk of any court of record in the county where the lands applied for are situated, and in exceptional cases before a clerk of any court of record in the land district in which the lands are situated, was to relieve applicants and entrymen who live at a distance from the local United States offices from expense and hardship. Such legislation is remedial, and is to be construed so as to effectuate the purpose of Congress and secure the relief which was designed. It is common knowledge that clerks of courts are to be found in very few of the counties in the Territories wherein a great part of the public lands is situated, while in almost every county there is a deputy.

A construction which restricts the meaning of the term "clerk of any court of record" to the principal practically defeats the purpose of Congress and denies the relief designed by it as to a large portion of the public domain. There is nothing in the context of the legislation under consideration from which it may be inferred that Congress intended such a construction should be given to the words employed. It is therefore to be presumed that, by reference to "clerk of any court," Congress intended to include any "person authorized by law to perform the duties of such officer."

The Department is accordingly of the opinion that where deputies are duly empowered by congressional, State, or territorial laws to perform the duties of clerks of courts of record, the affidavits, proofs, and oaths named in the act of March 11, 1902, may be made before such deputies with like effect as though made before their principals.

ALLEN LAUGHLIN.

Motion for review of departmental decision of February 25, 1902, 31 L. D., 256, denied by Secretary Hitchcock April 12, 1902.

LIEU SELECTIONS UNDER THE ACT OF JUNE 4, 1897.

KERN OIL CO. ET AL. *v.* CLARKE (ON REVIEW).

The word "vacant" in the act of June 4, 1897, as in part descriptive of land thereby made subject to selection in lieu of land situated in a public forest reservation and relinquished to the government, is used in its primary or ordinary sense of *unoccupied*, and not in a special, restricted, or technical sense, intended only to describe land "not taken or appropriated of record."

The land department has authority to make such rules and regulations, not inconsistent with law, as may be necessary or appropriate to secure the effective and convenient administration of any law which falls within its jurisdiction.

Wherever, by act of Congress, provision is made for the disposal of portions of the public lands of a designated class and character, selection or entry thereof under such act can not lawfully be permitted until the lands sought to be acquired under said act are shown to be of the class and character subject to disposal thereunder. When the evidence to enable such determination to be made does not appear from the land office records, it must be furnished by those who seek title under the act.

Under proceedings in the land department to acquire title to public land, no rights in the land are to be regarded as having become vested in the party seeking title until he shall have performed all the conditions and fulfilled all the requirements necessary to establish his right to a patent.

The action of the local land officers upon questions of law or fact respecting the disposal of the public lands does not conclude their superior officers or the government. Such action is, in all cases, reviewable by the Commissioner of the General Land Office and by the Secretary of the Interior as the proper administration of the law or the demands of justice may require.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *April 12, 1902.* (A. B. P.)

This case is again before the Department on C. W. Clarke's motion for review of the decision of April 25, 1901 (30 L. D., 550), wherein certain forest reserve lieu land selections, filed by Clarke December 14, 1899, embracing the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 4, T. 29 S., R. 28 E., M. D. M., Visalia land district, California, were rejected.

The selections were filed under the act of Congress of June 4, 1897 (30 Stat., 11, 36), wherein, among other things, it was provided—

That in cases in which a tract covered by an unperfected *bona fide* claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the law respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

To this provision certain amendments were made by an act approved June 6, 1900 (31 Stat., 588, 614), but the amendments are not applicable to these selections.

In the course of the decision under review, the Department said (pp. 555-6):

The act in question contains an offer by the government to exchange any of its lands that are vacant and open to settlement for a like quantity of lands, within a forest reservation, for which a patent has been issued, or to which an unperfected *bona fide* claim has been acquired. If he desires to accept the offered exchange, the owner or claimant of the tract in the forest reservation can relinquish the same to the government and select a tract of public land of like quantity in lieu of the tract relinquished. He is to make the selection, and in doing so he is confined to lands which are both vacant and open to settlement. They must not be occupied by others, nor reserved from settlement on account of their known mineral character or otherwise. With these exceptions the field for selection, except when otherwise specially provided, is co-extensive with the limits of the public domain. Further restrictions are imposed by the amendment of June 6, 1900, but they are not applicable to this case.

When do rights under the selection become vested? In the disposition of the public lands of the United States, under the laws relating thereto, it is settled law: (1) That when a party has complied with all the terms and conditions necessary to the securing of title to a particular tract of land, he acquires a vested interest therein, is regarded as the equitable owner thereof, and thereafter the government holds the legal title in trust for him; (2) that the right to a patent once vested, is, for most purposes, equivalent to a patent issued, and when in fact issued, the patent relates back to the time when the right to it became fixed; and (3) that the conditions with respect to the state or character of the land, as they exist at the time when all the necessary requirements have been complied with by a person seeking title, determine the question whether the land is subject to sale or other disposal, and no change in such conditions, subsequently occurring, can impair or in any manner affect his rights.

In support of the propositions stated a number of authorities were cited and applied, and in view thereof it was held (p. 560):

These established principles, in the opinion of the Department, are applicable to selections under the act of June 4, 1897. The act clearly contemplates an exchange of equivalents. Such is the unmistakable import of its terms. In the case of the relinquishment of patented lands title is to be given by the government for title received. When an unperfected *bona fide* claim is relinquished, the claimant is to be placed in the same situation with respect to the selected tract that he occupied with respect to the tract relinquished. If a complete title is surrendered, the right to a

complete title in return is secured. If only an unperfected claim is surrendered, the same rights are secured with respect to the new claim that were possessed with respect to the claim surrendered.

After having considered and answered certain contentions by those claiming against the selections, the Department finally summed up its conclusions upon the question as to the time and manner of the vesting of rights under selections based upon said act, as follows (p. 565):

(1) That where a person making selection under the act of June 4, 1897, has complied with all the terms and conditions necessary to entitle him to a patent to the selected land, he acquires a vested interest therein and is to be regarded as the equitable owner thereof.

(2) That the right to a patent under the act, once vested, is, for most purposes, the equivalent of a patent issued, and when in fact issued, the patent relates back to the time when the right to it became fixed and takes effect as of that date.

(3) That questions respecting the class and character of the selected lands are to be determined by the conditions existing at the time when all requirements necessary to obtaining title have been complied with by the selector, and no change in such conditions, subsequently occurring, can affect his rights.

It was further said and held in said decision:

What are the essential requirements of the statute respecting the selection of the lieu land with which one seeking title thereto must comply? Upon relinquishing to the government the tract in the forest reservation, he must make selection of the tract desired in exchange therefor. The act so expressly declares. But what showing must he make with respect to the selected tract? The statute authorizes selection only of "vacant land open to settlement." To be vacant, the land must not be occupied by others. To be open to settlement, it must not be known to be valuable for minerals, or reserved from settlement for any other reason. In so far as the existing conditions appear from the land office records, that is, whether the selected tract is of lands to which the settlement laws have been extended, and whether the same is free from record appropriation, claim, or reservation, no showing by the selector in respect thereto need be made for the reason that the officers of the government can and must take notice of the public records. But as to conditions the existence or non-existence of which can not be determined by anything appearing upon the public records and as to which the officers of the government must depend entirely upon outside evidence, that is, whether the selected tract is occupied by others or known to be valuable for minerals, it is manifestly necessary that the required evidence should be furnished by the selector. The officers of the government can not be expected to know whether land selected under the act is vacant and not known to be valuable for minerals, and in these respects subject to selection. . . .

Nor can selections be lawfully accepted until there is a showing that the selected land is vacant and not known to be valuable for minerals. No other lands are subject to selection, and no selection can be regarded as complete until these essential conditions are made to appear. They do not appear from the public surveys. In this case the lands were surveyed in 1854. Whether since that date they have been continuously, or at any time, vacant, or occupied, and whether at any time known to be valuable for minerals, and if so, whether stripped of their minerals and worked out, are matters not shown by the land office records.

The right to a patent is not acquired in any case until the proofs are such that patent could be issued upon them if nothing were shown to the contrary. As long as anything remains undone which it is essential should be done by the selector in order to entitle him to a patent, the right thereto does not vest.

That a non-mineral affidavit should accompany the selection is not seriously questioned by appellant. It is just as essential that it should be accompanied by a vacancy or non-occupancy affidavit. Appellant's contention that the word "vacant," as used in the statute, means public lands which are not shown by the records of the local office or General Land Office to be claimed, appropriated, or reserved, can not be accepted. Portions of the public lands may be occupied, and for that reason be not subject to selection, and yet there be no mention of their occupancy in the records of the land department. It frequently occurs that persons desiring to secure title to lands under the homestead law, settle upon and occupy the same, for months and even years, before placing their claims of record. By the act of May 14, 1880 (21 Stat., 140, Sec. 3), such settlers are given the same time to file their claims and place their entries of record as was originally given to settlers under the pre-emption law (Secs. 2264 and 2265, R. S.). But for various causes it frequently occurs that the time is allowed to pass without entry, and the occupancy is continued by the claimants with the hope and expectation of making entry at some future date. And, as was said by the supreme court in *Tarpey v. Madsen* (178 U. S., 215, 221):

"It is a matter of common knowledge that many go on to the public domain, build cabins and establish themselves, temporarily at least, as occupants, but having in view simply prospecting for minerals, hunting, trapping, etc., and with no thought of acquiring title to land. Such occupation is often accompanied by buildings and enclosures for housing and care of stock, and sometimes by cultivation of the soil with a view of providing fresh vegetables. These occupants are not in the eye of the law considered as technically trespassers. No individual can interfere with their occupation, or compel them to leave. Their possessory rights are recognized as of value and made the subjects of barter and sale."

It is thus seen that mere occupancy of the public lands, while creating no right as against the government (*Camfield v. United States*, 167 U. S., 518; *Frisbie v. Whitney*, 9 Wall., 187; *Yosemite Valley Case*, 15 Wall., 77), is recognized as creating valuable possessory rights in the individual occupants as against all other persons. Unquestionably Congress has the power to protect rights of the character indicated, and it was evidently the intention to furnish such protection as against persons making selection under the act in question; otherwise the word "vacant," as used in the act, would be meaningless. Its use was not necessary to except from selection lands claimed, appropriated or reserved as shown by the land office records. The words "open to settlement" fully and more appropriately exclude lands in that condition. They are not open to settlement. In the *Shaw-Kellogg* case, *supra*, the supreme court, referring to the words "vacant land," as used in the act of June 21, 1860, held, as we have seen, that the grantees under that act "were not at liberty to select lands already occupied by others." The Department knows of no reason why the same ruling should not be applied to the act of 1897.

It was found that the printed form of affidavit used by Clarke in making the selections in question, while in some respects different from the form prescribed by the departmental regulations, contained both non-mineral and non-occupancy averments; that the non-occupancy averments had been stricken out before the affidavits were verified or filed, and the result thereof was that the selections were not accompanied by any showing whatever respecting the state of vacancy or occupancy of the land at the time of selection. For this reason the affidavits were held to be insufficient and the selections to be imperfect.

The existing occupancy and known value of the land for mining purposes having been admitted at the argument and by the record, it

was further held, in view of such admission, that the required proofs could not then be supplied, and the selections were accordingly rejected.

No exception is taken in the motion for review to the holding of the former decision as to the time when the selector's rights become vested, if at all; or as to the time with respect to which, by the conditions then existing, the class and character of the selected land are to be determined; or as to the effect of the vesting of rights under selections and the issuance of patents for the selected land. The errors assigned as to other parts of the decision are, briefly stated, as follows:

1. In defining the words "vacant land," used in the act of June 4, 1897, to mean *unoccupied* land, and in holding that land, to be subject to selection under the act, must not be occupied by others.

2. In holding that proof of the vacancy or non-occupancy of the land at the time of selection must be furnished by the selector, and that such proof can not be furnished, after the selection has been filed, to take effect as of the date of such filing, when in the mean time the selected land has come to be occupied by others who have, by discovery and development work, demonstrated that it is valuable mineral land.

On application by Clarke, oral argument upon the questions presented by the motion for review was granted, and notice thereof given to all parties interested. Counsel on both sides participated in the oral argument, and also filed lengthy and exhaustive printed briefs in support of their respective contentions.

It is a familiar rule of construction that the words of a statute are to be read and understood in their primary or ordinary sense, and according to their usual import and common acceptation, unless to so construe them would be clearly repugnant to the legislative intention, or would lead to manifestly incongruous or absurd results. (Sutherland on Statutory Construction, Sec. 248; Sedgwick on Construction of Statutory and Constitutional Law, pp. 219-20; Potter's Dwarrris, p. 203; Black on Interpretation of Laws, pp. 125 *et seq.*)

In its primary or ordinary sense, *vacant* means empty; unfilled, unoccupied; as a *vacant* or empty box; a *vacant* or unfilled office; a *vacant* or unoccupied house or lot.

It is contended, however, that the word *vacant*, as used with respect to the public lands, had, prior to the act of June 4, 1897, by executive, legislative, and judicial construction, acquired a special, restricted, and technical meaning, the equivalent of "not taken or appropriated of record," and was so used in said act, and not in the sense of *unoccupied*, as held in the decision under review.

Counsel have referred to portions of the annual reports of the Commissioner of the General Land Office, to certain regulations and decisions of the land department, and to acts of Congress and judicial decisions, in all of which the word *vacant* was employed prior to the

passage of the act of 1897. These have all been carefully examined. In some of them the word appears to have been used in its primary or ordinary sense. In others it has been used in the special or restricted sense contended for. In still others, it seems to have been used in both the primary and special senses; that is, as intended to embrace lands neither occupied nor appropriated of record. In some it is not clear in what sense the word is used, whether in its primary, special, or double meaning.

It is not true, as contended, that it has been uniformly used by the supreme court in the sense of "not taken or appropriated of record." This is shown by the following cases:

In *Atherton v. Fowler* (96 U. S., 513, 518-9), decided at October term, 1877, the court, speaking of a controversy which arose under the pre-emption law, said:

Among the things which the law required of a pre-emptor, and the principal things required of him to secure his right, were: 1. To make a settlement on the land in person. 2. To inhabit and improve the same. 3. To erect a dwelling-house thereon. Sect. 2259, Rev. Stat.

At the moment the land on which the hay in this case was cut became liable to pre-emption, the whole of it was, by the various persons claiming under Vallejo, 1, settled on by them in person; 2, inhabited and improved by them; and, 3, it had dwellings erected on it by them.

Unless some reason is shown, not found in this record, these were the persons entitled to make pre-emption, and no one else. But suppose they were not. Does the policy of the pre-emption law authorize a stranger to thrust these men out of their houses, seize their improvements, and settle exactly where they were settled, and by these acts acquire the initiatory right of pre-emption? The generosity by which Congress gave the settler the right of pre-emption was not intended to give him the benefit of another man's labor, and authorize him to turn that man and his family out of their home. It did not purpose to give its bounty to settlements obtained by violence at the expense of others. The right to make a settlement was to be exercised on unsettled land; to make improvements on unimproved land. To erect a dwelling-house did not mean to seize some other man's dwelling. It had reference to vacant land, to unimproved land; and it would have shocked the moral sense of the men who passed these laws, if they had supposed that they had extended an invitation to the pioneer population to acquire inchoate rights to the public lands by trespass, by violence, by robbery, by acts leading to homicides, and other crimes of less moral turpitude.

In *Hosmer v. Wallace* (97 U. S., 575, 579-80), decided at October term, 1878, the court said:

To create a right of pre-emption there must be settlement, inhabitation, and improvement by the pre-emptor, conditions which cannot be met when the land is in the occupation of another. Settlement, inhabitation, and improvement of one piece of land can confer no rights to another adjacent to it, which at the commencement of the settlement is in the possession and use of others, though upon a subsequent survey by the government it prove to be part of the same sectional subdivision. Under the pre-emption laws, as held in *Atherton v. Fowler* (96 U. S., 513), the right to make a settlement is to be exercised on unsettled land; the right to make improvements is to be exercised on unimproved land; and the right to erect a dwelling-house is to be exercised on vacant land; none of these things can be done on land when it is occupied and used by others.

The word *vacant* was clearly used by the court, in these cases, in the sense of *unoccupied* and not in the sense of "not taken or appropriated of record." It has not been shown, and can not be, that, prior to June 4, 1897, the word, as applied to the public lands, had acquired an exclusive, special or restricted, and technical meaning, the equivalent of "not taken or appropriated of record." Under established rules of construction, the word, in the act of 1897, must be given its primary or ordinary meaning, unless the subject matter or language of the act clearly shows that it was intended to be understood as referring only to the status of land as shown by the land office records, or unless to give to it its primary or ordinary meaning would lead to incongruous or absurd results.

There is nothing in the language of the act or in the nature of the subject to which it relates to show that the word "vacant" was used necessarily and exclusively to describe lands "not taken or appropriated of record." On the contrary, as stated in the decision under review, the use of this word was not necessary to except from selection lands claimed, appropriated, or reserved as shown by the land office records. The words "open to settlement" fully and more appropriately exclude lands in that condition. Nor can there be any reasonable objection to the construction of the word in its primary or ordinary sense of unoccupied, on the ground that such construction might lead to incongruous or absurd results.

The chief purpose of the act of 1897 was to provide a means whereby the government might acquire the title and control of lands covered by private ownership or claim within the limits of forest reservations, with the view to promoting the objects for which the reservations were established, and whereby the owners or claimants of such lands might obtain in exchange therefor other lands outside the reservations, with the view to relieving themselves of the disadvantages resulting from the withdrawal from settlement and other disposition of the public lands surrounding them. It was provided that lands so held might be exchanged for an equal quantity of "vacant land open to settlement" outside the reservations. The owners or claimants of lands within a forest reservation, if they desired to avail themselves of the proffered exchange, were required to relinquish to the government the lands so owned or claimed by them, and they were to make selection of the lands to be taken in exchange. Except where otherwise specially provided, and subject to the conditions that only lands vacant and open to settlement could be taken, it was the purpose to permit the selections to be made anywhere within the limits of the public domain. With this vast area from which to make selections, it can not reasonably be claimed that a construction of the word "vacant" such as is contended for in the motion for review is necessary to the

effective operation of the statute, or to the accomplishment of the objects for which it was enacted.

Congress had the unquestioned power to restrict the right of selection as it chose, and could so legislate as to avoid bringing a new and probably numerous class of applicants for public lands into antagonism with settlers upon and occupants of the public lands, who were there at the invitation or by the license of the government, and whose settlement or occupancy was not shown upon the land office records. There are many instances in public-land legislation where, in providing a new mode of disposing of public lands, Congress has been careful to avoid contests between individuals and to prevent claimants under the new law from disturbing the possessory rights or imperfect claims of others. In providing a field for selection embracing large portions of twenty-three States and two Territories (Arizona and New Mexico), as is done in the act of 1897, a purpose on the part of Congress to restrict selectors under that act to lands which are not occupied but are vacant is not at all strange or unreasonable. The words of the statute, in their primary or ordinary sense, are plainly expressive of an intention to make this restriction, and to refuse to give effect to the intention thus expressed would be violative of settled and important rules of statutory construction and not permissible.

The act of Congress of February 25, 1885 (23 Stat., 321), is referred to. By that act inclosures of the public lands by any person, association, or corporation, not based upon a claim or color of title made or acquired in good faith, or upon any claim of right asserted in good faith with the view to entry under the general land laws, and the exclusive use and occupancy of any of the public lands, without claim, color of title, or asserted right of entry, as aforesaid, were declared to be unlawful and prohibited. It is urged that Congress could not have intended the word "vacant," in the act of 1897, to be understood in its primary or ordinary sense of unoccupied, for, it is said, that would have been equivalent to recognizing as lawful a thing declared to be unlawful by the act of 1885.

The conditions which led to the passage of the act of 1885, and the evil intended to be corrected, are, in a measure, disclosed by the report made by the Public Lands Committee of the United States Senate, when the bill was pending before that body, where it was said:

The necessity of additional legislation to protect the public domain because of illegal fencing is becoming every day more apparent. Without the least authority, and in open and bold defiance of the rights of the government, large, and oftentimes foreign, corporations deliberately inclose by fences areas of hundreds of thousands of acres, closing the avenues of travel and preventing the occupancy by those seeking homes. While those fencing allege the lands within such enclosures are open to settlement, yet no humble settler, with scarce the means for the necessities of life, would presume to enter any such inclosure to seek a home.

A construction of the act of 1897 which would give to it a meaning different from that flowing from the ordinary and natural import of its language, is not required in order that the two acts may stand together and full force and effect be given to each. The meaning accorded to the word "vacant" in the act of 1897 by the decision under review does not operate to impair the effectiveness of the act of 1885. It produces no incongruity in the two acts.

In any event, the full scope and effect of the act of 1885, as bearing upon that of 1897, is not a matter that need be now determined, for the case here under consideration is not one wherein the proofs accompanying the selection are to the effect that there was no occupancy of the land other than one shown to be violative of the act of 1885 or otherwise unlawful. It will be sufficient to consider the question arising upon such a state of facts when a case is presented embodying them. Here the selector presented no proof whatever respecting the condition of the selected land, that is, whether occupied or unoccupied, and if occupied, whether lawfully so or not. Nor do the papers presented by the protestants assist the selector in this matter, because so far as they make any suggestion respecting the condition of the lands in controversy at the time of their attempted selection it is to the effect that they were occupied for the purpose and in the course of mining exploration and work, which were being conducted with a view to the development and utilization of deposits of mineral oil believed to exist therein; and as indicating that this occupancy was in good faith and within the protection of the mining laws, it appears, by admission of the parties, that this mining exploration and work resulted in the production of petroleum oil in large and valuable quantities, giving to the land an unquestioned mineral character.

It is insisted that this Department has held the word "vacant," in the act of 1897, to have no reference to the physical status of the land authorized by the act to be selected; that such was the ruling at the time the selections here in question were filed; and that in the decision under review a change of ruling was made, to the prejudice of rights acquired by this selector under the former ruling. The case of *F. A. Hyde*, decided April 14, 1899 (28 L. D., 284), is cited. An examination of that case shows that the principal issue was whether unsurveyed as well as surveyed lands could be selected under the act of 1897. On that question the Department stated and held as follows:

It is to be observed that the words "surveyed" or "unsurveyed" do not anywhere appear in the provision of the statute hereinbefore set out, nor is there any language therein which indicates an intention to limit the selection of lieu land under the said provision to surveyed lands. The only limitation as to kind or condition of the lands subject to lieu selection thereunder is contained in the words "vacant land open to settlement." This language is so clear and explicit as to leave no room for construction. "Vacant land open to settlement" is any public land to which rights may be initiated by settlement, under existing laws. Unsur-

veyed, as well as surveyed, lands for many years past have been and still continue to be open to settlement. It was entirely competent for Congress to limit such selections to surveyed lands, or to extend them to both surveyed and unsurveyed lands, and the words "vacant land open to settlement" including as they do unsurveyed as well as surveyed lands, must be given their proper legal effect. It follows that lien selections, under the said provision, are not confined to surveyed lands, but may also be made of unsurveyed lands.

It is perfectly clear, from the language quoted, that what the Department decided was that the words "vacant land open to settlement," in their proper legal effect, include unsurveyed as well as surveyed lands, and that, therefore, selections under the act could not be confined to surveyed lands, but might embrace unsurveyed lands as well. No question as to the interpretation of the word "vacant" separately from the words "open to settlement" was considered. No such question was involved in the case. The issue raised with respect to the words "vacant land open to settlement" was, whether they embraced unsurveyed lands, and that only. It was held they did. That holding was not based upon the word "vacant," but upon the words "open to settlement," and this the decision plainly shows. The case does not justify the position assumed by counsel with respect to it.

The ruling of the Department in the case of Baca Float No. 3, decided July 25, 1899 (29 L. D., 44), also prior to the filing of these selections, is important to be observed in this connection. That case involved the construction of a statute similar to the one here under consideration. By act of June 21, 1860 (12 Stat., 71-2), Congress granted to the heirs of Luis Maria Baca the right to select, in lieu of certain lands claimed by them under a Mexican grant in the vicinity of Las Vegas, New Mexico, "an equal quantity of vacant land, not mineral," in square bodies not to exceed five in number, in the Territory of New Mexico. One of the issues presented by the record was stated in the decision as follows:

Is the question as to the character of the land selected—that is, whether vacant and not mineral and therefore subject to the grant, or occupied, or mineral, and for that reason not subject to the grant—to be determined with relation to the date of the selection, or with reference to the date of the approval of the survey of the claim?

After considering and deciding that and other questions in the case, the Department directed the Commissioner of the General Land Office, in accordance with the principles announced in the decision, to cause a survey of the grant to be made, based upon the selection of June 17, 1863. With respect to such survey it was said:

Specific directions should be given that lands vacant, and not known to be mineral at the date of said selection, are to be surveyed as subject to the grant, and that all lands ascertained by the surveyor-general to have been occupied, or known to be mineral, at such date, if any, within the boundaries of said selection, must be excluded from the survey as not being subject to the grant.

Certain language used by the supreme court in the case of *Shaw v. Kellogg* (decided May 22, 1898; 170 U. S., 312, 332) is also of interest

in this connection. One of the series of selections authorized by the act of June 21, 1860 (selection No. 4), was involved in that case. The court, among other things, said:

The grant was made in lieu of certain specific lands claimed by the Baca heirs in the vicinity of Las Vegas, and it was the purpose to permit the taking of a similar body of land anywhere within the limits of New Mexico. The grantees, the Baca heirs, were authorized to select this body of land. They were not at liberty to select lands already occupied by others. The lands must be vacant. Nor were they at liberty to select lands which were then known to contain mineral. Congress did not intend to grant any mines or mineral lands, but with these exceptions their right of selection was coextensive with the limits of New Mexico.

It is thus seen that before these selections were filed, and within a period of less than two years prior to their filing, both the supreme court and this Department, had interpreted the word "vacant," used in an act which, with respect to the matter here under consideration, is the same as the act of 1897, to mean *unoccupied*. There is no foundation for the assertion of counsel to the effect that these selections were made in the light of an established interpretation, either departmental or judicial, of the word *vacant* as applied to the public lands generally, or as used in the act of 1897, contrary to that given in the decision under review.

It is objected that the language of the court in the Shaw-Kellogg case, defining the word "vacant" in the act of 1860 as meaning unoccupied, is mere *obiter*, and, for that reason, no weight should be given to it. In its opinion the court said:

It will also be perceived that Congress did not permit this location to be made anywhere in the public domain, but only within the limits of the Territory of New Mexico. It was not like a military land warrant, subject to location upon any public lands, but only a grant which could be made operative within certain prescribed and comparatively narrow limits—limits not even so broad as those of the territory ceded by Mexico. There were then but few persons living in New Mexico; it contained large areas of arid lands; its surface was broken by a few mountain chains, and crossed by a few streams. It was within the limits of this territory, whose condition and natural resources were but slightly known, that Congress authorized this location.

Then follows the language first quoted from the decision, wherein it is stated that the only exceptions to the right of selection granted the Baca heirs within the limits of New Mexico were these:

They were not at liberty to select lands already occupied by others. The lands must be vacant. Nor were they at liberty to select lands which were then known to contain mineral.

The objection relates to the statement of the first exception. Viewed in the light of the earlier decisions in *Atherton v. Fowler and Hosmer v. Wallace*, *supra*, wherein the court used the word *vacant* in the sense of unoccupied, and in a manner entirely free from the objection here raised, this statement in *Shaw v. Kellogg*, even if it be *obiter*, is nevertheless of importance and weight as showing what the court considers the ordinary and natural import of the word to be when applied to the public lands.

The case of *Cosmos Exploration Company v. Gray Eagle Oil Company*, decided November 15, 1901 (112 Fed. Rep., 4), by the circuit court of appeals for the ninth circuit, involved the selection, under the act of June 4, 1897, by one J. R. Johnston, of certain lands situated in the same township and section as the lands here in controversy. Practically the same questions were presented in that case as in this. The court held that the word "vacant" was used in the act in the sense of *unoccupied*, the same as held by the Department in the decision under review. In the course of its opinion the court, among other things, said (pp. 14, 15):

From the allegations of the bill, it appears that at the time of appellants' selection of the lands in question, no discovery of any mineral had been made. Appellees could not, at that time, have acquired any title to the lands included in their locations. The discovery of mineral was essential for that purpose; but they were not trespassers upon the public lands of the United States. They had a lawful right to be there. They were in occupancy of the land they had located. They claimed it to be mineral and were diligently at work to prove it to be such. Under these circumstances it can not, in our opinion, be said to be vacant land at the time of appellants' selection thereof under the provisions of the act of 1897. The land was not vacant and open to settlement at that time because it was then occupied by the defendants' grantors under a claim and color of right. It matters not that they had not at that time acquired any rights against the United States.

* * * * *

The fact that defendants under their mining locations had not, at the time of Johnston's selection of the land as agricultural, discovered any petroleum, that being the mineral for which their locations were made, shows that they had not perfected their locations under the mining laws; that their absolute right to the exclusive possession of the ground covered by their locations, as against the government of the United States, had not accrued to them, and the government might, if it had seen fit to do so, have terminated the license theretofore given to them to occupy the land, and congress might have granted the land to others. But under the act of June 4, 1897, it will be observed that congress did not grant the right under the forest reserve act to select any lands unless they were vacant. It therefore necessarily follows that, if the land was not vacant and open to settlement, Johnston did not acquire any title to the lands in question. He was, in the eye of the law, a trespasser, because so far as that act is concerned the lands were excepted from such selection, and by attempting to make such selection he was a mere intruder and his grantee is not in a position to question the validity of the defendants' locations.

It is further contended that, even if it be true that the word "vacant," used in the act of 1897, was properly defined in the decision under review, the land department is without the power or authority, by rules and regulations, or otherwise, to require proof of the vacancy or non-occupancy of lands selected under said act to be furnished by the selector as a condition to the acceptance of the selection. Such is not the law.

That the administration of this statute falls within the jurisdiction of the land department there can be no doubt (*Bishop of Nesqually v. Gibbon*, 158 U. S., 155, 167; *Knight v. Land Association*, 142 U. S., 161, 177). Nor can there be any question of the authority of the land department to make rules and regulations appropriate or necessary to

secure the convenient and effective administration of any act of Congress which falls within its jurisdiction (Sec. 2478, R. S.). Besides being specially authorized by statute, such rules and regulations are in many instances absolutely essential to the proper and efficient exercise by the land department of the jurisdiction conferred by law upon it (See Secs. 441, 453, Revised Statutes), and even if there were no special statute on the subject, the power to make such rules and regulations would arise from the inherent necessities of the case.

Every tribunal, upon which the duty of determining contested questions of law or fact is imposed, must of necessity possess the power, when not otherwise specially provided in the law imposing the duty, to establish and maintain rules of practice and methods of procedure whereby to execute the law and to administer evenhanded justice to litigants. The principle is axiomatic.

Wherever, by act of Congress, provision is made for the disposal by selection, entry, and patent, of portions of the public lands of a designated class and character, as was done by the act of June 4, 1897, it is the duty of the land department to ascertain and determine whether lands sought to be acquired under the act are of the class and character thereby made subject to disposal. Until such determination has been made and the lands found to be such as the act describes, entry thereof can not be lawfully allowed. The evidence to enable this to be done, when such evidence does not, and could not from the conditions to be inquired into, appear from the land office records, must of necessity be furnished by those who seek title under the act. The land officers are not required, and from the nature of things could not be required, to take judicial cognizance of the physical condition of lands with respect to which, in the discharge of their duties, they are called upon to act.

Lands occupied by others or known to be valuable for minerals are not subject to selection under the act of 1897. Whether so occupied or known to be valuable for minerals are questions which can not always, or even ordinarily, be determined by anything appearing upon the public records. For the purpose of such determination resort must generally be had to outside evidence. This evidence must be furnished by the selector. It is his duty to show, in so far as physical conditions are concerned, that the land to which he seeks title is of the class and character subject to selection. He can not entitle himself to a patent until he has made such showing. Until then his selection is not complete. Until then he has not complied with the terms and conditions necessary to the acquisition of a patent, and can not be regarded as having acquired any vested interest in the selected land.

The law is settled that until a party seeking title to public lands has complied with all the requirements essential to the establishing of his right to a patent, the right does not vest. See the authorities

cited on this subject in the decision under review. It was said in that decision that—

The right to a patent is not acquired in any case until the proofs are such that patent could be issued upon them if nothing were shown to the contrary. As long as anything remains undone which it is essential should be done by the selector in order to entitle him to a patent, the right thereto does not vest.

It is not denied by the selector that proofs necessary to establish the right to a patent must be furnished before a patent may be rightfully issued for the selected land, but he contends that the furnishing of such proofs is not essential to the validity of the selection, and therefore not a condition to the vesting of equitable rights under it. The argument is, that if, at the time of filing the selection, the land, as matter of fact, though not shown by any proofs, is of the class and character subject to selection, the equitable title immediately vests in the selector, and that proofs to show the land to be of the requisite class and character may be furnished afterwards, at any time prior to the issuance of patent, to take effect as of the date of filing the selection, even though the condition of the land may have so changed in the mean time as to take it out of the class and character of land subject to selection.

The proposition can not be sustained. It is contrary to the established doctrine that, under proceedings in the land department to acquire title to public land, no equitable rights in the land are to be regarded as having become vested in the party seeking title until he shall have performed all the conditions and fulfilled all the requirements necessary to establish his right to a patent. It is opposed to the principle that as long as anything remains to be done by the party seeking title, which it is essential should be done before patent can be issued, the right thereto does not vest. The land department is not authorized to accept selections under the act of lands not shown, by proper proofs, to be of the class and character subject to selection. Certainly no right can vest in the selector until there arises the duty on the part of the land department to accept the selection.

The statement made in the briefs, to the effect that at the time of filing these selections (December 14, 1899) there was no rule or regulation of the land department which required that selections must be accompanied by evidence showing the selected land to be unoccupied, is not justified by the facts. The printed form of application set out in the decision under review (form 4-643) was prescribed by the Commissioner of the General Land Office in April, 1898, and approved by the Secretary of the Interior May 9, 1899 (28 L. D., 521, 524), as in said decision stated. It contained the following clause:

There are also submitted certificates from the proper officers showing that the land relinquished, or surrendered, is free from encumbrance of any kind; also that all taxes thereon, to the present time, have been paid; and an affidavit showing the lands selected to be non-mineral in character and unoccupied.

This form of application was in use at the time the selections were filed. No other had been issued with the approval of the Secretary of the Interior. The clause requiring the selector to submit with his selection "an affidavit showing the lands selected to be non-mineral and unoccupied" is clear and unequivocal. There can be no doubt as to its meaning.

It was stated by counsel at the oral argument, and the statement is repeated in a brief since filed, that the form of application in use at the time these selections were filed contained a requirement that "evidence of publication" should be submitted with all selections, a thing impossible inasmuch as publication was not required until after the selections were filed. Counsel are mistaken. The facts are, that prior to January, 1900, the only prescribed form of application was the one (4-643) copied into the decision under review. At the date last named a new form, like the old one, excepting that, after the words "encumbrance of any kind" in the clause above quoted, the words "evidence of publication" were inserted, was printed at the instance of the General Land Office. The additional words were inadvertently inserted without any authority from the Secretary of the Interior, who afterwards directed that the changed form be not used. This matter, however, has no bearing upon the case under consideration.

One other matter should be mentioned. It is urged that, even if the departmental regulations, at the time of the filing of the selections in question, required that proof of the vacancy or non-occupancy of the selected land should accompany the selections, the acceptance of these selections by the local land officers in the absence of such proof was a waiver of the requirement, and that such waiver is binding on the government.

The proposition is unsound. If followed as a rule of law the Secretary of the Interior would be practically shorn of the supervisory power and authority over the disposal of the public lands, vested in him by sections 441, 453, and 2478 of the Revised Statutes. The action of the local land officers upon questions of law or fact respecting the disposal of the public lands does not conclude their superior officers or the government. Such action is, in all cases, reviewable by the Commissioner of the General Land Office, and by the Secretary of the Interior, as the proper administration of the law or the demands of justice may require (*Orchard v. Alexander*, 157 U. S., 373; *Knight v. Land Association*, 142 U. S., 161; *Parsons v. Venzke*, 164 U. S., 89).

It would serve no useful purpose to discuss all the authorities which have been cited, or to specially state all the arguments advanced. It is enough to say, in conclusion, that, after careful consideration of all that has been presented, the Department finds no error in the original decision. The rulings complained of are accordingly adhered to, and the motion for review is overruled.

LIEU SELECTIONS UNDER THE ACT OF JUNE 4, 1897.

GRAY EAGLE OIL CO. *v.* CLARKE (ON REVIEW).

In the absence of express provision in section 2488, R. S., giving to the surveyor-general final authority over surveys in California, the power of supervision and direction lodged in the Commissioner of the General Land Office and the Secretary of the Interior by sections 441, 453 and 2478, R. S., necessarily extends to surveys of public lands in that State in like manner as to other public land transactions. The Secretary is not bound to accept and recognize for any purpose a survey of the public lands in California or elsewhere where there is mistake or fraud in its execution or approval, even though the returns or notes accompanying it show a portion of the land embraced therein to be swamp and overflowed.

A purchaser of alleged swamp and overflowed land from the State of California after survey but before legal title had passed to the State by certification under section 2488, R. S., takes it subject to the power of the Secretary of the Interior to reject the survey, if not a lawful one, and to require that a correct survey be made.

Lands in the State of California claimed under the swamp-land acts, which have never been properly identified as of the character intended to be granted to the State under those acts, and which have never been certified or patented to the State thereunder, are not the subject of relinquishment or exchange under the act of June 4, 1897.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *April 16, 1902.* (W. C. P.)

The defendant in the case of Gray Eagle Oil Company *v.* C. W. Clarke has presented a motion for review of the decision of April 25, 1901 (30 L. D., 570), wherein his selections of lots 1 and 2 of the SW. $\frac{1}{4}$ and lots 1 and 2 of the NW. $\frac{1}{4}$ of Sec. 30, T. 28 S., R. 28 E., M. D. M., California, presented December 8, 1899, and again January 13, 1900, under the provisions of the act of June 4, 1897 (30 Stat., 11, 36), were rejected.

Both sides have submitted arguments both orally and by printed briefs in the course of which every question involved in the case has been fully presented and ably discussed, and the whole case has been again carefully examined and considered.

The provision of the act of June 4, 1897, *supra*, under which these selections were presented reads as follows:

That in cases in which a tract covered by an unperfected *bona fide* claim or by a patent is included within the limits of a forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry or recording or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

The lands offered as bases for the selections of December 8, 1899, were claimed by Clarke under a patent from the State of California

which referred to the swamp land grant of September 28, 1850, as the source of title in the State, and to a certificate of the register of the State land office as showing that the tracts of swamp and overflowed lands therein described had been duly and properly surveyed in accordance with law. The history of this purported survey is fully set forth in the decision of April 25, 1901, and need not be repeated here. A plat and field notes of the claimed survey of this township, approved by the surveyor-general in 1884, were rejected by your office in 1886. They were again submitted without change, except the addition of a new certificate of approval by the surveyor-general dated February 5, 1897. The survey was then accepted by your office letter of March 1, 1897, transmitting the triplicate plats to the surveyor-general to be filed in the proper local land office. They were thus filed April 26, 1897. Early in March of that year the Secretary of the Interior directed a further investigation of this survey which resulted in the final rejection thereof by your office on March 2, 1899, under instructions of the Secretary of January 26, 1899. No patent or certificate covering these lands has ever been issued to the State.

The first question presented is as to the title of Clarke to the tracts of land offered as bases for the selections of December 8, 1899. It is not necessary to quote the assignment of errors presented in support of this motion for review, for the position taken by the attorneys is sufficiently shown by a formal statement of their contentions contained in a printed brief as follows:

1. That the representation of these lands as swamp and overflowed on the approved plat and survey made under the authority of the United States *ipso facto* and instantly, forever identified them as such, and the Department thereupon lost all jurisdiction to affect this conclusive evidence of their character, it being thus *determined* that title passed to the state at the date of the grant of September 28, 1850.

2. Even though the Department after the return of California swamp land surveys has continued jurisdiction to set aside survey, still such return is a record muniment of the state's title, and can only be set aside or taken away upon proper notice to the state and to the purchaser therefrom; this not having been given, the attempted setting aside of the survey was void, and it therefore still stands.

3. Assuming that the Surveyor General's return was not conclusive in favor of the state, it is so in favor of a party who purchases from the state relying thereon without notice of defect therein. Clarke was such a purchaser.

4. Assuming that the Department still retained jurisdiction in the premises, the United States can not take advantage of the mistake or wrong of its own officers, and hence can not set aside this survey for any alleged mistake or fraud of theirs to which neither the state nor its purchaser were parties.

5. The land is, as a fact, independent of the Surveyor General's return, *swamp and overflowed in character*, and if such return is not conclusive evidence of its character so as to show title in the state, Clarke should be permitted to establish its character in "some other appropriate mode," which he hereby offers to do.

It is urgently insisted now, as it was in the original presentation of the case, that the representation of these tracts as swamp and overflowed operated immediately upon the approval of the plat of survey

to vest the title thereto in the State and that the Secretary of the Interior had no further jurisdiction over such lands, the arguments now advanced and the authorities now cited in support of that proposition being substantially the same as were used then.

The general authority and duty of the Secretary of the Interior to require correct surveys of the public lands, preparatory to their disposition, and to reject fraudulent or incorrect surveys or those not made in conformity with the law and regulations thereunder after approval by the surveyor-general, are not questioned. It is contended, however, that a different rule obtains as to surveys in California where any tract of land embraced therein is represented as swamp and overflowed. The claim is that the approval of the surveyor-general concludes the Secretary and prevents him from taking any action looking to a rejection or correction of such a survey at least so far as the tracts thus represented as swamp and overflowed are concerned. This contention is based upon a provision of the act of July 23, 1866 (14 Stat., 218), which reads as follows:

That in all cases where township surveys have been, or shall hereafter be, made under authority of the United States, and the plats thereof approved, it shall be the duty of the Commissioner of the General Land Office to certify over to the State of California, as swamp and overflowed, all the lands represented as such, upon such approved plats, within one year from the passage of this act, or within one year from the return and approval of such township plats.

This provision was substantially re-enacted as section 2488, Revised Statutes, which provides:

It shall be the duty of the Commissioner of the General Land Office, to certify over to the State of California, as swamp and overflowed lands, all the lands represented as such upon the township surveys and plats, whether made before or after the 23rd day of July, 1866, under the authority of the United States.

This provision did not authorize a new class of surveys but speaks of the ordinary surveys of the public lands over which the Secretary has full power and control. It does not contemplate the making of surveys for the express purpose of identifying swamp and overflowed lands, but refers to those authorized by law for placing the public lands in condition for disposal under the general land laws. This provision imposed no new duty upon the surveyor. It is required in all surveys that the notes or returns of the surveyor shall show the character and quantity of the lands surveyed. The preparation of the notes and returns which are to be consulted for ascertaining the facts necessary to the identification of swamp and overflowed lands is merely an incident of the surveys spoken of in the act of 1866 and section 2488 of the Revised Statutes, just as it is an incident of all other surveys of the public lands. The surveys in California were to be made as all other surveys. The mere fact that the notes or returns made in connection with a survey are to be re-

ceived as conclusive proof of the character of the lands surveyed or of a certain class of them, should not and does not deprive the Secretary of the Interior of the authority vested in him to secure correct surveys of the public lands, nor does it relieve him of the duty imposed upon him of requiring that the work in connection with such a survey shall be actually and correctly performed in conformity with the law and regulations. Where such incidents follow public surveys the necessity for the full performance of the duty of supervision is heightened, not lessened. The language of the act of 1866 does not indicate an intent to take the execution of surveys in California out of the control and supervision of the Secretary of the Interior. The effect of that act was to make conclusive against the government certain facts established by its records made in connection with the survey of the public lands coming within the terms of that act. Neither the manner of making those surveys nor the procedure in connection therewith was changed in any particular. The Secretary of the Interior has the same authority and duty to require, in respect of surveys coming within the purview of that act, a correct and honest execution of the work as he has in other cases of surveys of the public lands.

The argument in support of this motion for review goes upon the theory that the United States surveyor-general for the State of California is constituted a special tribunal, and that his approval of a survey is a judicial determination that any tract characterized by that survey as swamp and overflowed passed to the State under the act of 1850. It is claimed this position has support in expressions found in decisions of this Department. Thus, in *California v. Martin* (5 L. D., 99), the return of the surveyor-general is spoken of as "a final adjudication," and it is said that his "adjudication and decision . . . has the same binding force and effect as any other final judgment and can only be impeached or set aside on the ground of fraud or mistake in its procurement." In the case of *State of California* (14 L. D., 253) the surveyor-general is said to be the "tribunal to determine what lands were swamp at the date of the grant." But the inaccuracy in thus describing the functions of the surveyor-general is pointed out in the later case of *State of California* (23 L. D., 230, 234). In the absence of express provision in section 2488 giving to the surveyor-general final authority over surveys in California, the power of supervision and direction lodged in the Commissioner of the General Land Office and the Secretary of the Interior by sections 441, 453, and 2478 of the Revised Statutes necessarily extends to surveys of public lands in that State in like manner as to other public land transactions. *Knight v. U. S. Land Association* (142 U. S., 161, 167); *Orchard v. Alexander* (157 U. S., 372, 375); *Catholic Bishop of Nesqually v. Gibbon* (158 U. S., 155, 166); *Parsons v. Venzke* (164 U. S., 89, 91).

The decisions of the supreme court cited and relied upon in support

of this motion, which are the same as were referred to when the case was under consideration before, do not, as was pointed out in the former decision, involve any question as to the effect to be given a false or fraudulent survey. In *Tubbs v. Wilhoit* (138 U. S., 134, 142), it was pointed out that prior to April 17, 1879, it had not been the practice to require specific approval by the Commissioner of the General Land Office before surveys or plats of townships were deemed so far final as to sanction sales or selections of the lands surveyed and platted, and in connection with that statement it was said:

It is true that wherever fraud or error existed in the action of the United States surveyor-general for the State, the power of correction was vested in the commissioner, but where the survey was itself correct and the township plat conformed thereto, they became final and effective when filed in the local land office by that officer.

It was also pointed out that the same views had been expressed by Secretary of the Interior Schurz in 1877 and held to be correct by the supreme court in *Frasher v. O'Connor* (115 U. S., 102, 114). The last-cited case goes far to sustain the position taken in the decision here sought to be reviewed in that it recognizes the authority of the Secretary to control the matter of the survey of the public lands. These decisions of the supreme court support the proposition that the Secretary of the Interior is not bound to accept and recognize for any purpose a survey of the public lands in California or elsewhere where there is mistake or fraud in its execution or approval, even though the returns or notes accompanying it show a portion of the land embraced therein to be swamp and overflowed.

If there was fraud or error in the survey of this township or its approval, the Secretary had power to require its correction. There was grave error, if not fraud, and the Secretary, in the exercise of the authority vested in him, set it aside and directed that a new one be made. No new survey had been approved or accepted prior to Clarke's selection, and, hence, there was not at that time any existing survey of this township that could afford any evidence as to the character of the tracts in question.

The power of correction exists, at least, so long as the legal title has not passed from the United States by the issuance of a patent or its equivalent, which, under section 2488, is a certification. It was exercised in due time in respect of the survey in question here.

The execution of the survey was a matter in which the State could have no voice, and, hence, it was not necessary that notice of any proposed examination as to the manner in which the work was done should be given her or any one claiming under her. It has never been the practice of the land department to give such notice. Applying the statement of the supreme court quoted above, it is only upon the condition that the survey was itself correct and the township plat conformed thereto that they became final and effective as evidence of the

character of the land shown to be swamp and overflowed. Before the matter had passed beyond the jurisdiction of the Secretary in this case appropriate action was taken which effectually prevented the survey of said township being accepted as conclusive evidence for any purpose. If such action was effectual against the State it was equally so against all persons claiming through her. If the evidence relied upon did not exist there was nothing whatever to support the claim whether asserted directly by the State or by another claiming as her grantee. It is therefore wholly unimportant whether Clarke purchased after the survey in question had been set aside, as appeared to be the fact when the case was originally under consideration, or whether he claims, as is now asserted, under a purchase initiated before that action was had and consummated afterward. So long as the legal title had not passed to the State by certification under section 2488 he took the land subject to the power of the Secretary to reject the survey, if it was not a lawful one, and to require that a correct survey be made. He did not become a *bona fide* purchaser under these circumstances. *Hawley v. Diller* (178 U. S., 476.)

But if notice of the proposed rejection of the survey had been necessary, its only purpose would have been to afford the State an opportunity to show that the Secretary was without authority in the premises or that the facts surrounding the survey did not call for or justify its rejection. Notice and consequent opportunity to be heard while the matter remained in the control of the Secretary are all that could be expected or demanded. The State is not here complaining, and its grantee, Clarke, was, by the decisions of the Commissioner of the General Land Office of January 30, 1901, rejecting Clarke's first selections of the lands in controversy, fully notified of the rejection of the survey and of the proceedings leading thereto. No new survey had yet been effected and no disposition of the land had been made or attempted, so that the matter was still in a situation where upon a proper showing that the rejection of the survey was beyond the authority of the Secretary, or that the survey had been correctly executed and was rejected upon a misapprehension of the facts, the Secretary could have revoked the rejection and have given full effect to the survey. But at no time has any attempt been made to demonstrate that the facts surrounding the survey were not as found by the Secretary or that such facts did not require its rejection. If the survey was rejected upon a misapprehension of the facts, Clarke has had ample opportunity to show the real situation, but has failed to take any steps in that direction. Upon the question of the authority of the Secretary to reject the survey, Clarke was fully heard upon his appeal from the Commissioner of the General Land Office and again upon the motion for review now under consideration. After careful consideration of the argument presented upon that question, the authority of the Secretary was sustained in the decision under review,

and after like attention to the argument since submitted that ruling is here adhered to.

It is now contended that the land is as a fact swamp and overflowed and that if the return of the surveyor-general is not to be accepted as conclusive evidence of that fact Clarke should be permitted to establish its character by other evidence. In other words, he asks to be now allowed to perfect his selections as of the time they were made, by proof that he had title to the tracts of land offered as bases for such selections. The proof of title to the lands relinquished is a necessary factor in exchanges authorized by the act of 1897. Until satisfactory proof that the title to the lands offered in exchange for others is in the applicant is submitted, he has not done all that is required of him. Until he has done all that is required of him he acquires no vested right in the land he proposes to select. This proposition, to now submit proof necessary to perfect his application as of the date it was presented, can not be approved. Neither would it be of any avail to him to allow him to submit such proof with a view to perfecting his application as of the date when it shall be presented, because the now known character of the lieu land applied for is such as to prevent its selection under the provisions of said act of June 4, 1897.

In concluding this branch of the case it will suffice to say, that the swamp-land act of September 28, 1850, specifically required the issuance to the State of both a certificate and a patent; that section 2488 of the Revised Statutes, taken from the later act of July 23, 1866, specifically requires the issuance of a certificate to the State; that the lands relinquished as a basis for the selections filed December 8, 1899, have never been certified or patented to the State; that they have never been identified as of the character intended to be granted to the State by said swamp-land acts, under which Clarke claims, except by a survey repudiated and rejected by the Secretary of the Interior, before the State's conveyance to Clarke and before his attempted relinquishment under the act of June 4, 1897, because the survey was erroneously, if not fraudulently, made and did not conform to law and existing regulations. Lands, the title to which is in this condition, are not "covered . . . by a patent" and are not the subject of relinquishment or exchange under the forest reserve lieu land act. (See 29 L. D., 594.)

All questions presented by this motion for review, except that as to the validity of Clarke's title to the tracts offered as bases for his selections of December 8, 1899, are discussed and ruled upon in a decision of the 12th instant, denying a similar motion in the case of Kern Oil Company *et al.* v. Clarke, and it is not necessary to repeat that discussion here.

April 14, 1902, Clarke filed an amended motion for review, urging that the records show that no protest was ever presented against his selection of lots 1 and 2 of the NW. $\frac{1}{4}$ of said section 30, T. 28 S.,

R. 28 E., and "that there is no contention or claim by any person whomsoever, that this one hundred and sixty (160) acres was occupied or claimed by anybody, or was mineral in character at the time of selection; that the record is entirely free from any such claim and that there is no issue raised in respect thereto, nor can there be in the record as it stands for review." It is claimed that under these circumstances Clarke's selection of these two lots should be approved.

An examination of the files now before the Department does not disclose the original protest against the selection of said lots. There is, however, ample proof that such a protest was duly filed by the Gray Eagle Oil Company. A letter of the register of the local land office to the Commissioner of the General Land Office, dated June 26, 1900, states that this protest was filed February 10, 1900, purports to give the substance thereof, and recommends that a hearing be ordered thereon. The decision of the General Land Office of February 11, 1901, mentioned this protest and purports to quote its material parts. Notations upon various papers in the files also mention said protest. In a petition filed by Clarke in this Department January 18, 1901, asking that the Secretary in the exercise of his supervisory authority direct the Commissioner of the General Land Office to forward the papers in said case for departmental action, in advance of action by the General Land Office, it is alleged that Clarke filed selections for the lots 1 and 2 of the NW. $\frac{1}{4}$ of said section 30 and for lots 1 and 2 of the SW. $\frac{1}{4}$ thereof, and it is said:

That upon the 10th day of February, 1900, the Gray Eagle Oil Company, the protestant in the above entitled cases, filed in the United States land office at Visalia, California, a verified protest against each of the above forest lieu selections of said Clarke, asking that such selections be rejected and disallowed on the ground that the lands selected were covered by prior placer mining locations and that the same were mineral in character and not subject to selections under the forest reserve lieu land act and asking that a hearing be ordered to determine the character of the lands selected.

At another place in said petition it is said:

That these petitioners attach hereunto a copy of each of the protests filed in the above cases marked respectively Exhibits "A" and "B."

Attached to the petition is an exhibit marked "A" which purports to be a copy of a protest by the Gray Eagle Oil Company against Clarke's selection of lots 1 and 2 of the NW. $\frac{1}{4}$ of said section 30, which contains the language quoted by the Commissioner of the General Land Office in his decision of February 11, 1901. It is clear that there was a protest against said selection and that the amended motion for review was evidently made under misapprehension of the facts.

It is not believed that there was any error in the conclusion reached in the original decision in this case, and therefore the motions for review are denied.

REPAYMENT—DESERT-LAND ENTRY—NON-CONTIGUOUS TRACTS.

ABRAHAM COLE.

The right of repayment will be recognized in case of a desert-land entry erroneously allowed for land on both sides of a meandered stream, which was of the class which should have been meandered, and which renders the tracts embraced within the entry non-contiguous, notwithstanding the entry was canceled for a different reason.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *April 23, 1902.* (C. J. G.)

Abraham Cole appeals from the decision of your office of October 18, 1901, denying his application for repayment of the first instalment of purchase money paid by him on desert-land entry, made May 31 1890, for the W. $\frac{1}{2}$ SW. $\frac{1}{4}$, lot 4, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, lot 3, lots 1, 2, 5, 6 and 7, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 22, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ Sec. 23, NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 26, and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 27, T. 7 N., R. 1 W., Boise City, Idaho, land district.

Repayment is claimed upon the ground that the entry was erroneously allowed and not susceptible of confirmation, within the meaning of section 2 of the act of June 16, 1880 (21 Stat., 287), because the tracts embraced therein are situated on both sides of a meandered stream, and must therefore be regarded as non-contiguous. The application was denied by your office for the reason that the entry was procured upon the false and misleading representations of the entryman, in this, that it was developed at a hearing ordered upon the report of a special agent that the land in question is more valuable for the mineral it contains than for agricultural purposes, is not susceptible of irrigation, and the entry canceled for that reason.

It is shown by the plat of survey that the Payette river, which is a meandered stream, flows through this land, and it was so stated by the entryman in his declaration at the time of filing his application to enter. The fact that the different tracts included in this entry are thus rendered non-contiguous is conceded by your office.

The last proviso to the first section of the desert-land act of March 3, 1877 (19 Stat., 377), is as follows:

That no person shall be permitted to enter more than one tract of land . . . which shall be in compact form.

If the tracts composing this entry are rendered non-contiguous by reason of being on both sides of a meandered stream, the entry is necessarily non-compact in form for the same reason, as the term "compact" is sufficiently comprehensive to exclude every condition or relation that would render tracts of land non-contiguous. Therefore, in the allowance of this entry, there was a clear violation of the statutory requirement of compactness, which precluded its confirmation.

This being true, the reason for the cancellation of the entry, upon application for repayment, is of no moment. William D. Wheeler (30 L. D., 355); Henry Cannon (30 L. D., 362). In the matter of an entry under the homestead law it has frequently been held that the same can not be allowed for land on both sides of a meandered stream which was of the class that should have been meandered, and which renders the entry non-contiguous.

The decision of your office is reversed and repayment will be allowed as applied for, unless it shall appear, upon investigation, that the stream in question is one that under the regulations should not have been meandered.

LIEU SELECTION UNDER ACT OF JUNE 4, 1897—MINERAL LAND.

BAKERSFIELD FUEL AND OIL CO. *v.* SAALBURG.

No rights become vested in a selector under the act of June 4, 1897, until there has been a concurrence of (1) a relinquishment to the United States of the base land with proof that the relinquishment carries full title, and (2) a selection of other land in lieu of that relinquished with proof that the land selected is at the time of such concurrence of the character and condition subject to selection.

Where a selection is not accompanied by a showing that the land selected is vacant, no vested rights are obtained by its presentation, and an affidavit subsequently filed to the effect that the land was vacant at the time of attempted selection, can not be given a retroactive operation so as to perfect the selection as of the date of its filing.

When an applicant for public lands under the non-mineral laws has complied with all the terms and conditions necessary to secure title to a particular tract of land, he acquires a vested interest therein, if it is then not known to contain mineral deposits and is otherwise of the condition and character subject to disposition under the law under which he seeks title, and thenceforth the mining laws have no application to the land, the applicant is regarded as the equitable owner, the government holds the legal title in trust for him, and no subsequent discovery of mineral in the land, or other change in its condition or character, can impair or in any manner affect his right or title.

In a case where, before a selector complies with the terms and conditions necessary to secure a vested right under the act of June 4, 1897, it is shown by exploration and development that the selected tract is in fact mineral, and is claimed and occupied under a mining location, the selection must be rejected.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *April 23, 1902.* (G. F. P.)

December 26, 1899, Samuel W. Saalburg filed selection under the act of June 4, 1897 (30 Stat., 11, 36), for the N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 18, T. 28 S., R. 28 E., M. D. M., being surveyed land in the Visalia, California, land district, in lieu of an equal quantity of patented land owned by him in a public forest reservation.

A recorded deed by the selector relinquishing and reconveying to the United States the base land, an abstract of title thereto, and an

affidavit stating that the land selected was non-mineral in character accompanied the selection, but there was no proof that the selected land was vacant.

A different tract from that relinquished was erroneously described by Saalburg in his formal application as the basis for the lieu selection, and February 8, 1900, he amended the application so as to correctly describe the tract relinquished.

February 20, 1900, the Bakersfield Fuel and Oil Company filed a corroborated protest, alleging that at the date the selection was filed the selected land was occupied by the protestant under a placer mining location covering the entire SE. $\frac{1}{4}$ of said section;—

that at the time of making said location the locators thereof had made a discovery of minerals thereon and within the boundary lines of said placer mining claim, which discovery consisted of finding sands and shale containing petroleum and the residuum of petroleum in such quantities and state as would lead any petroleum miner to make further development upon said claim for the purpose of ascertaining the quantity of petroleum therein contained;—

that at the time of filing said selection the land embraced in the mining location had been and was being worked and developed, by the protestant, for its mineral oils, and at the date of the protest was still occupied by the protestant, and that a well had been sunk thereon in which petroleum was found. Affidavits subsequently filed state that a well had been sunk on the premises, in which oil in paying quantities has been found.

February 21, 1900, your office directed the local officers at Visalia, California, to suspend from disposition, until further orders, the lands in certain townships in their district, including T. 28 S., R. 28 E., in which the lands in controversy are situated.

February 25, 1901, an affidavit dated two days before was filed by the selector in the local office, stating:

That on December 26th, 1899, and on February 8th, 1900, there was no occupation of said land adverse to the selection thereof under the act of June 4, 1897, by Samuel W. Saalburg; that on both of said dates the land applied for was agricultural in character and contained no known deposits of coal or other minerals.

June 12, 1901, your office rendered a decision superseding a prior one, not here material. By the later decision your office rejected the selection on the ground that Saalburg did not accompany the selection with any proof that the selected land was unoccupied and therefore subject to selection, and on the further ground that this land had been suspended from disposition before the proof necessary to perfect the selection was presented.

The selector has appealed to the Department.

There has been no point of time in this case when there was a concurrence of (1) a relinquishment to the United States with proof that the relinquishment carried full title, and (2) a selection of other land

in lieu of that relinquished with proof that the land selected was at the time of such concurrence of the character and condition subject to selection. Inasmuch as no showing that the land selected was vacant accompanied the selection, no vested right was obtained by its presentation. The affidavit filed February 25, 1901, does not purport to show, nor has the selector otherwise attempted to prove, that the land has not been since February 8, 1900, lawfully occupied and claimed under the mining laws or that it has not been since that time demonstrated to contain valuable deposits of oil and therefore to be mineral in character and not subject to selection. For aught that appears in the affidavit the land may have been at the time when the affidavit was made occupied and claimed by protestant or others under the mining laws and have been yielding oil in large and paying quantities. Indeed the affidavit, as a matter of apparent caution, refers to the dates of December 26, 1899, and February 8, 1900, and says: "This affidavit is made upon the evidence *then* found upon the surface of the ground; deponent does not undertake to express an opinion in this affidavit as to what may be under the ground." This affidavit cannot be given a retrospective operation so as to perfect the selection as of December 26, 1899, or February 8, 1900, as against the protestant who, according to the undisputed proof now before the Department, was in the possession and occupancy of the land at the time this affidavit was filed, and was then engaged in developing and utilizing its mineral resources which had been discovered and claimed by it under the mining laws. Mineral lands not being "open to settlement" are not subject to selection under the act of June 4, 1897; and by reason of various provisions in the public land laws public lands containing valuable mineral deposits are subject to exploration, location, occupation and purchase under the mining laws and are not subject to disposition under other laws. But since public lands may contain valuable mineral deposits which have not been discovered or in any way become known, thereby making it possible for persons to in good faith make entry thereof and obtain patents therefor under the non-mineral laws without having at the time any knowledge of such mineral deposits and without being reasonably charged with notice thereof, and since controlling equitable considerations and the stability of titles obtained from the United States require that a perfected equitable or legal title ought not to be disturbed or affected by the subsequent discovery of mineral in the land, it has come to be regarded as settled law, established by a long line of judicial and departmental decisions, that when an applicant under the non-mineral laws has complied with all the terms and conditions necessary to secure title to a particular tract of land, he acquires a vested interest therein, if it is then not known to contain valuable mineral deposits and is otherwise of the condition and character subject to disposition under the law under which he seeks title, and thence-

forth the mining laws have no application to the land, the applicant is regarded as the equitable owner, the government holds the legal title in trust for him, and no subsequent discovery of mineral in the land or other change in its condition or character can impair or in any manner affect his right or title. (See *Kern Oil Co. et al. v. Clarke*, 30 L. D., 550; *Gray Eagle Oil Co. v. Clarke*, 30 L. D., 570; *Kern Oil Co. v. Clotfelter*, 30 L. D., 583; *Kern Oil Co. et al. v. Clarke*, 31 L. D., 288.)

In this case the selector has never complied with the terms and conditions necessary to secure title under the act of June 4, 1897, the land in controversy has therefore continued to be subject to the mining laws, and the protestant, as appears by the uncontradicted proofs now before the Department, has by exploration and development under the mining laws demonstrated that the land is mineral in character and is now claiming and occupying the same under a mining location.

Apart therefore from any consideration of the order of suspension of February 21, 1900, your office decision rightfully rejected Saalburg's selection, and for the reasons herein given that decision is affirmed.

WHITE EARTH INDIAN RESERVATION—SALE OF TIMBER—ACT OF JUNE 7, 1897.

OPINION.

All Indians residing upon the White Earth reservation are entitled to share in the proceeds of dead timber on that reservation disposed of under the act of June 7, 1897.

The township in the White Earth reservation set apart for the special occupancy of the Pembina Indians is, so far as the act of June 7, 1897, is concerned, to be regarded as a separate reservation, and not a part of the White Earth, and the Indians residing thereon are entitled to the proceeds of dead timber taken therefrom under said act.

Assistant Attorney General Van Devanter to the Secretary of the Interior, April 25, 1902. (W. C. P.)

I am in receipt of your request for an opinion as to what Indians are entitled to share in the distribution of the funds derived from the sale of timber on the White Earth diminished reservation under the act of June 7, 1897 (30 Stat., 62, 90).

The provision referred to reads as follows:

The Secretary of the Interior may in his discretion, from year to year, under such regulations as he may prescribe, authorize the Indians residing on any Indian reservation in the State of Minnesota, whether the same has been allotted in severalty or is still unallotted, to fell, cut, remove, sell or otherwise dispose of the dead timber standing or fallen, on such reservation or any part thereof, for the sole benefit of such Indians.

The language of this provision is plain and unambiguous. The "Indians residing upon any Indian reservation in the State of Minnesota," are the persons who may be authorized to remove and dispose of dead timber on such reservation and this is to be done "for the sole benefit of such Indians," that is, the Indians residing upon the reservation from which such timber may be removed. This description embraces, in respect of the White Earth reservation, all Indians residing there. Unless there is some other provision of law or something in the history of the transactions with these Indians that demonstrates that such a result could not have been intended, this provision must be held to declare that all Indians residing upon the White Earth diminished reserve shall share in the proceeds of timber disposed of thereunder.

Formerly the various tribes of Chippewa Indians in Minnesota occupied separate reservations. The act of January 14, 1889 (25 Stat., 642), provided for negotiations with the Indians for the cession of all such reservations, except the Red Lake and White Earth, and of so much of those as were not needed for individual allotments to the Indians, for the removal of all the Indians except those on the Red Lake to the White Earth reservation, for the allotment of lands in severalty to the Red Lake Indians on Red Lake reservation, and to all others on the White Earth reservation, and for the sale of the ceded lands for the benefit of "all the Chippewa Indians in the State of Minnesota." An agreement was made as contemplated by said act of 1889 and the work of removing the Indians to and settling them upon the White Earth reservation had been substantially accomplished prior to the passage of the act of June 7, 1897.

In the passage of this later act Congress acted with a knowledge of existing conditions. If it had been intended to confer the privileges and benefits arising out of that act upon the Indians originally occupying the White Earth, or any other reservation affected thereby, and to exclude from such privileges Indians removed to and settled upon such reservation by virtue of the provisions of the act of 1889, apt words to express such an intention would have been employed. This was not done and there is nothing either in said act of 1897 or in that of 1889, which provided for a readjustment of the affairs of said Indians, to justify this Department in ignoring the plain purport of the act of 1897 and making any discrimination in the distribution of the proceeds of timber disposed of under the authority granted thereby between the Indians who originally occupied the White Earth reservation and those who were located thereon in the administration of the act of 1889.

In the papers submitted attention is called to the fact that the act of March 3, 1873 (17 Stat., 530, 539), made an appropriation for the purchase from the Mississippi bands of Chippewa Indians of one township

of land in the White Earth reservation for the use and benefit of the Pembina band of Chippewa Indians. A township was purchased and a part of the Pembina band was located thereon and still resides there. This township was in effect carved out of the White Earth reservation and set apart for the Pembina band. It must for the purposes of the act of 1897, *supra*, be considered as a separate reservation. The Indians for whose occupancy it was purchased, and who are residing thereon, would be entitled to all proceeds derived from the sale of dead timber removed therefrom, but are not entitled to share in the proceeds of dead timber taken from the lands constituting the White Earth reservation after the elimination of this township.

It seems that certain of the Mille Lac band have refused to remove to and settle upon the White Earth reservation although lands therein have been set aside for the purpose of making allotments to them when they shall remove thereto. The Commissioner of Indian Affairs contends that those Indians are interested in the tribal lands of that reservation and therefore entitled to participate in the distribution of money arising from the sale of timber taken from such lands under the act of 1897. They are not, however, "Indians residing upon" that reservation and are not within the descriptive terms of that act. Whether they have or have not an interest in that reservation that would entitle them to share in the proceeds of a sale of the land itself, is a question that it is not necessary to consider at this time. The evident purpose of Congress was to give the Indians residing on any particular reservation assistance in establishing and maintaining themselves in their changed surroundings. The removal of the dead and down timber will not detract from the value of the land or the growing timber but will in fact be a benefit to both.

After a careful consideration of the matter I am of opinion, and so advise you, that all Indians residing upon the White Earth reservation are entitled to share in the proceeds of dead timber on that reservation disposed of under the act of 1897; that the township set apart for the special occupancy of the Pembinas is, so far as that act is concerned, to be regarded as a separate reservation and not a part of the White Earth reservation, and that the Indians residing upon this separate Pembina reservation are entitled to the proceeds of dead timber taken from such separate reservation under said act.

Approved, April 25, 1902.

E. A. HITCHCOCK, *Secretary*.

PRACTICE—NOTICE—RULE 100 CONSTRUED.

INSTRUCTIONS.

In all cases where sufficient service has been made on an adverse party, who fails to appear or to respond to said notice, the case shall be treated as an *ex parte* proceeding, and can thereafter be proceeded with without further notice to him.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) April 26, 1902. (E. F. B.)

The Department is in receipt of your letter of April 8, 1902, requesting a construction of Rule 100, of Rules of Practice, in its application to a certain class of cases referred to in your letter. Rule 100 reads as follows:

Ex parte cases and cases in which the adverse party does not appear will be governed by the foregoing rules as to notices of decisions, time for appeal, and filing of exceptions and arguments, as far as applicable. In such cases, however, the right to file additional evidence at any stage of the proceedings to cure defects in the proof or record will be allowed.

The purpose of your inquiry is to ascertain whether, in cases where the adverse party is in default, your office may allow the plaintiff to cure defects in the proof or record, and to supply the additional evidence by affidavits, without notice to the defendant.

It was the purpose of the rule that in all cases where sufficient service has been made on an adverse party who fails to appear or to respond to said notice, the case shall be treated as an *ex parte* proceeding. Hence, where it appears from the record that the adverse party has been properly served with notice of the proceeding and is in default, the case can thereafter be proceeded with without further notice to him.

The rule makes all cases wherein default is made, after proper service, subject to the conditions and practice relating to *ex parte* cases. In this view you will have no difficulty in making a proper application of the rule in all cases.

LIEU SELECTION UNDER ACT OF JUNE 4, 1897.LEAMING *v.* McKENNA.

A statement in the non-occupancy affidavit accompanying a lieu selection made under the act of June 4, 1897, that the land selected is "unoccupied by any one having color of title thereto," is not a proper showing respecting the condition of the land; if it is occupied at all the affidavit should state fully all the facts relating thereto, so as to enable the land department to determine the character and effect of the occupancy.

Public land suspended from disposition by direction of the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, is not subject to selection under the act of June 4, 1897.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *April 29, 1902.* (A. B. P.)

October 29, 1900, Richard E. McKenna filed selection, under the act of June 4, 1897 (30 Stat., 11, 36), for the NW. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 28; the S. $\frac{1}{2}$ of Sec. 32; and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 34, all in T. 17 S., R. 14 E., M. D. M., Visalia, California, containing 640 acres, in lieu of certain other lands situated partly in the Sierra forest reserve and partly in the Pine Mountain and Zaca Lake forest reserve, in California, and represented as containing 657.03 acres.

The selection was accompanied by duly recorded deeds from the selector to the United States, conveying the base lands, properly authenticated abstracts showing complete and unencumbered title in the selector at the time of the making of said deeds of conveyance, and by the affidavit of the selector, stating the selected land to be non-mineral in character and "unoccupied by any one having color of title thereto."

Prior to the filing of the selection, to wit, February 28, 1900, your office issued an order suspending from disposition the lands in said township 17, until further directions should be given, and this order of suspension still remains in force. Because of such suspension the local officers rejected McKenna's selection, March 2, 1901, and thereupon he appealed.

By decision of July 15, 1901, your office affirmed the action below, and McKenna has appealed to the Department.

In the meantime, to wit, March 30, 1901, several affidavits were filed on behalf of the selector, wherein it is stated, in substance and effect, that the selected land and other lands in the same vicinity are sought to be acquired by the selector and one Sinon C. Lillis, for a stock range, for grazing, and for no other purpose; that the land is essentially grazing land and has no value for any other purpose; that there are no indications that the land contains valuable deposits of petroleum or any other mineral; and that there has been no attempt to develop oil or petroleum upon it. These affidavits do not state whether this land was, at the time of their filing, occupied or unoccupied.

April 19, 1901, E. B. Leaming filed protest against the selection, supported by the affidavits of two persons, and alleging that the selected land is—

essentially mineral in character, and contains petroleum and mineral oils, and is valuable only for its mineral purposes, and has no value for and is not in fact agricultural land.

The statement in the affidavit of the selector, filed with the selection, that the land was then "unoccupied by any one having color of title thereto," is not a proper showing respecting the condition of the land.

If it was occupied at all the affidavit should have fully given the facts relating thereto, so that the officers of the land department, and not the affiant, could determine its effect upon the proposed selection of the land. Generally speaking, land which is occupied is not subject to selection. It has not been determined that there are any exceptions. *Kern Oil Company v. Clarke* (31 L. D., 288).

Because the land attempted to be selected was at the time of filing the selection, and still is, suspended from disposition, with the approval of the Secretary of the Interior (*Wilcox v. Jackson*, 13 Pet., 498, 513; *Wolcott v. Des Moines Co.*, 5 Wall., 681, 688; *Grisar v. McDowell*, 6 Wall., 363, 381; *Riley v. Wells*, Book 19, Lawyers' Co-operative Pub. Co.'s Edition U. S. Supreme Court Reports, 648; *Wolsey v. Chapman*, 101 U. S., 755, 769; *Wood v. Beach*, 156 U. S., 548; *Spencer v. McDougal*, 159 U. S., 62, 64; *Hans Oleson*, 28 L. D., 25, 31), and because the selection has not at any point of time been supported by proofs that the selected land was then non-mineral and not occupied, each cause being in itself sufficient, it was rightly rejected, and the decision of your office is therefore affirmed.

HOMESTEAD—SOLDIERS' ADDITIONAL—ASSIGNEE.

WILLIAM E. MOSES.

No good reason exists for requiring the personal presentation of an application to make soldiers' additional entry, by either the soldier or his assignee, and if the proofs submitted in support thereof establish the material facts necessary to the existence of the right in the applicant, and the character of the land sought to be entered, they are sufficient, even though executed before some officer authorized to administer oaths outside of the land district in which the land sought to be entered is situate. Proof as to the character of the land may be made by any credible person having the requisite personal knowledge of the premises.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *April 30, 1902.* (D. C. H.)

William E. Moses, assignee of Julia Hampton, widow of Ephraim Hampton, deceased, has appealed from your decision of September 30, 1901, requiring him to show cause why his application to make entry, under section 2306 of the Revised Statutes, for the E. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 9, T. 41 N., R. 2 E., Lewiston, Idaho, land district, should not be rejected.

The decision appealed from held—

that the application, though signed by Moses as if made in person, is really made by the attorney in fact, as appears from the register's certificate at the foot of the application; the application is also accompanied by a power of attorney, and the attorney in fact made the non-mineral affidavit and filed the application before the local officers, while the affidavit of citizenship is made by Moses in Colorado. Notify the

applicant that he will be allowed sixty days within which to show cause why his application should not be rejected, for the reason that there is no provision in the law or regulations permitting a homestead entry to be made by an attorney in fact.

Said decision is based on the regulations found in the general circular of July 11, 1899 (page 31), which, in respect to entries by the assignee of a soldiers' additional right, provide—

An assignee of an uncertified right desiring to make an additional entry under this section must present his application as the assignee of the soldier for a specific tract of land to the register and receiver at the local office in whose jurisdiction the land lies, accompanying the same by a complete assignment duly executed, attested, and acknowledged as prescribed respecting the assignment of bounty land warrants. The identity of the original assignor with the soldier and original entryman must be established by the affidavits of two witnesses having personal knowledge of the facts, or, if such witnesses can not be procured, a satisfactory reason must be given and other facts presented tending to establish such identity.

The applicant must furnish his affidavit of *bona fide* ownership at the date of the application, evidence of his citizenship, the usual non-mineral affidavit, and the affidavit of the soldier showing that he has in no manner exercised his homestead right since making the original entry, either by making an additional entry under said section or under any other act.

The required affidavits must be sworn to and subscribed in the presence of the register or receiver or other officer authorized by law to administer oaths in homestead cases, and the officer administering the oath must certify to the identity and credibility of the party appearing before him.

If the proofs presented in support of this application can be considered, there is no question but that they show that Moses was, at the date his application was presented, possessed of the additional right of entry granted to Ephraim Hampton, that Moses was then a citizen of the United States, and that the land embraced in said application was unappropriated public land non-mineral in character.

The practical questions, therefore, presented by the appeal are: (1) Must the assignee of a soldiers' additional homestead right personally tender at the local land office of the district in which the land sought to be entered is situate, his application and accompanying proof in support thereof? (2) Must the affidavits required by the regulations in order to establish the right in the assignee be made in the land district in which the land sought to be entered is situate? (3) Can proof as to the character of the land be made by any other person than the assignee of the soldiers' additional right of entry?

The marked difference between the right of homestead entry conferred by section 2289, Revised Statutes, and the additional right of entry conferred upon certain soldiers by section 2306, is clearly set forth in the decision of the supreme court in *Webster v. Luther*, 163 U. S., 331, wherein it was held that the soldiers' additional right of homestead entry conferred by section 2306, is a mere gratuity, somewhat in the nature of compensation for the soldier's failure to get the full quota of one hundred and sixty acres by his first or original home-

stead entry, and that it was intended that such right was to be enjoyed by the donee in its fullest and most advantageous form, including the right of assignment, unhampered by conditions that would lessen or impair its value.

In the case of Ricard L. Powel (28 L. D., 216, 220), it was said:

Burdensome requirements of proof of the right to locate by assignment might, and in many cases would contribute to defeat the intention of Congress to make the right a valuable one. The measure of its value as a property right depends upon an ability to ultimately locate it upon the public lands of the United States, and unreasonable restrictions in the matter of proof may fetter and render less valuable the right, just as surely as a denial of the right to assign it, and would, therefore, be in violation of the spirit of the ruling of the supreme court in said case. [*Luther v. Webster*, 163 U. S., 331.]

To require of the assignee of such additional homestead right that he personally present his application at the district land office and personally make the required non-mineral affidavit, would serve no useful purpose, and would unnecessarily limit the use of the right and diminish its value; and while these questions were not specifically considered either in the case before the court or in the departmental decision referred to, yet the controlling force and effect of both decisions is against the requirement.

The statute is silent as to the mode of making proof in the exercise of this additional right, and the practice in other like cases is against the requirement. Locations of military bounty land warrants are permitted through an attorney in fact (see paragraph 29, regulations of February 18, 1896, 27 L. D., 223), as are also selections under the act of June 4, 1897 (30 Stat., 11, 36), in lieu of land within a forest reservation covered by a patent or patent certificate (29 L. D., 580). In the last case it was also held that the required non-mineral affidavit can be made by any credible person having the requisite personal knowledge of the premises.

Whether the right of additional entry is sought to be exercised by the soldier or his assignee, no good reason exists for requiring the personal presentation of the application, and if the proofs submitted therewith establish the material facts necessary to the existence of the right in the applicant, and the character of the land sought to be entered, it is sufficient, even though they may have been executed before some officer authorized to administer oaths outside of the land district.

For the reason given, your office decision is reversed. The regulations referred to, so far as in conflict herewith, will no longer be followed.

PRIVATE CLAIM—ARIZONA—ACT OF MARCH 3, 1891.

EDWARD GERARD, TRUSTEE, ROMAN CATHOLIC CHURCH OF SAN XAVIER DEL BAC.

In the enactment of the seventeenth section of the act of March 3, 1891, Congress had in contemplation the protection of individual possession, and the right of entry under said section can not be recognized where the possession is not of such character.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *April 30, 1902.* (E. F. B.)

With your letter of November 4, 1901, you transmit the appeal of Reverend Edward Gerard, V. G., trustee for the Roman Catholic church of San Xavier del Bac, from the decision of your office of July 5, 1901, rejecting his application for patent to fourteen acres of land in the SW. $\frac{1}{4}$, Sec. 21, T. 15, S., R. 13 E., Tucson, Arizona, on which is located the old San Xavier church and mission.

The application is made under the seventeenth section of the act of March 3, 1891 (26 Stat., 854, 862), as amended by the act of February 21, 1893 (27 Stat., 470), the survey of the township in which said land is situated having been made prior to the act of March 3, 1891. The section, as amended, reads as follows:

That in the case of townships heretofore surveyed in the Territories of New Mexico, Arizona, and Utah, and the States of Colorado, Nevada, and Wyoming, all persons who, or whose ancestors, grantors, or their lawful successors in title or possession, became citizens of the United States by reason of the treaty of Guadalupe Hidalgo, or the terms of the Gadsden purchase, and who have been in the actual continuous adverse possession of tracts, not to exceed one hundred and sixty acres each, for twenty years next preceding such survey, shall be entitled, upon making proof of such facts to the satisfaction of the register and receiver of the proper land district, and of the Commissioner of the General Land Office, upon such investigation as is provided for in section sixteen of this act, to enter without payment of purchase money, fees, or commissions such subdivisions, not exceeding one hundred and sixty acres, as shall include their said possessions.

* * * * *

Provided, however, That no person shall be entitled to enter more than one hundred and sixty acres in one or more tracts in his own right under the provisions of this section.

Section sixteen, referred to in the section above quoted, contains similar provisions with reference to claims in townships that had not been surveyed prior to the passage of said act of March 3, 1891, and provides that the Commissioner of the General Land Office, if satisfied, upon investigation, that the claimant comes within the provisions of the section, shall cause patents to be issued to the parties so found to be in possession for the tracts respectively claimed by them.

From the papers submitted with your letter it appears that the mission of San Xavier del Bac was established in 1692, and has been

continued as a mission ever since, the reverend fathers and resident priests having at various times opened and supported schools for the instruction of the Indians; that the present church building was erected upon the ground it now occupies nearly a century ago and has been in the continuous and uninterrupted possession of the Roman Catholic Church, through its constituted authorities, who have regularly administered to the congregation worshipping therein.

The site of this mission is within the boundaries of what was formerly the Papago Indian reservation, and when the surrounding lands were allotted in severalty to the Indians the occupancy of the land here in question was confirmed to the church "so long as the same shall be used for religious or educational work among the Indians." This confirmation was made under that provision of section 5 of the act of February 8, 1887 (24 Stat., 388), which reads:

And if any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law.

The church authorities preferring an absolute title, made application, as before stated, for a patent to the site of the mission, under the act of 1891, as amended by that of 1893. This application is the one which was denied by your office.

It is doubtful if it was the purpose of the act of 1891 to recognize every occupancy, possession and claim to lands in States and Territories named, as conferring a right to receive a patent under the sixteenth and seventeenth sections thereof. It was more probably the purpose to protect the possession and occupancy of small holding claimants, having no grant, who as individuals had used, claimed and occupied lands for the period named. The sixteenth section as originally enacted provided for patent only—

if it shall be made to appear to the satisfaction of the deputy surveyor making such survey that any person has, through himself, his ancestors, grantors, or their lawful successors in title or possession, been in the continuous adverse actual *bona fide* possession, *residing thereon as his home*, of any tract of land or in connection therewith of other lands, all together not exceeding one hundred and sixty acres in such township for twenty years next preceding the time of making such survey.

So the seventeenth section as originally enacted provided for patent only to—

persons who, or whose ancestors, grantors or their lawful successors in title or possession, became citizens of the United States by reason of the treaty of Guadalupe-Hidalgo, and who have been in the actual continuous adverse possession *and residence thereon* of tracts of not to exceed one hundred and sixty acres each, for twenty years next succeeding such survey.

It is true that the act of February 21, 1893 (27 Stat., 470), amended the sixteenth section by striking therefrom the words "residing thereon as his home," and amended the seventeenth section by striking therefrom the words "and residence thereon," but said amendments did not change the act otherwise than by dispensing with the necessity of actual residence on the land as a condition to obtaining patent.

It does not seem to have been intended by this legislation to give a right to make entry or receive patents for lands occupied by an aggregation of persons who had no individual interest in the land occupied, or to give such right to a corporate body or a religious association.

That Congress in the enactment of the seventeenth section of said act, under which this claim must be allowed if at all, had in contemplation individual possessions rather than those of associations or aggregations of individuals, is evidenced by the description of the persons to be entitled to its benefits. These are all persons who became citizens of the United States by reason of the treaty of Guadalupe-Hidalgo or the terms of the Gadsden purchase, and all persons whose ancestors, grantors or their lawful successors in title or possession thus became citizens. As to this particular case the application is made in behalf of the Catholic Church, and the possession asserted and relied upon to support it is that of the church maintained from a time prior to the Gadsden purchase. The possession relied upon being all the time that of the church, it follows that it can not be traced to any person who became a citizen of the United States under the terms of that purchase.

For the reasons above stated, the decision of your office rejecting the application, is affirmed. If the church authorities desire a higher and more permanent title than the confirmed right of occupancy given under the Indian allotment act it can only be obtained by further legislation, to which the Department sees no objection.

RAILROAD LANDS—BONA FIDE PURCHASER—ACT OF MARCH 3, 1887.

HUTTON ET AL. *v.* FORBES.

An applicant to purchase under the fifth section of the act of March 3, 1887, who, at the time of his purchase from the railroad company, had knowledge that there were conflicting claims to the lands and that the company's claim was being contested, is not necessarily chargeable with bad faith because of such knowledge.

One who with knowledge of the exception of mineral lands from the grant to the Southern Pacific Railroad Company purchases from said company lands within the limits of its grant, known to be mineral at the date of such purchase, is not a purchaser in good faith within the meaning of section five of the act of March 3, 1887.

If such lands were not known to be mineral at the time of their purchase, no subsequent discovery or development of minerals thereon could affect the question of the good faith of the purchase.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) May 3, 1902. (A. S. T.)

October 5, 1898, Lewis H. Lyon filed application for patent to the Oil King and Monarch Oil placer mining claims, known together as The Oil King Placer Mine, embracing lots 1, 2, 3, 4, 5, 6, 7, and 8, the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of Sec. 17, T. 4 N., R. 18 W., Los Angeles, California. Notice of the application was published for the usual period of sixty days, commencing October 7, 1898, and no adverse claim was filed; but entry was not allowed.

October 6, 1898, Charles H. Forbes, administrator of R. S. Baker, deceased, filed separate applications to purchase the lands in fractional sections 7 and 17, respectively, T. 4 N., R. 18 W., Los Angeles, California, under section 5 of the act of March 3, 1887 (24 Stat., 556), alleging that Baker had in his lifetime, by contract of May 16, 1892, purchased the lands in good faith from the Southern Pacific Railroad Company as having passed to it under its grant by the act of March 3, 1871 (16 Stat., 573). March 3, 1899, after due publication, Forbes submitted proof in support of said applications.

March 2, 1899, S. W. James filed protest against the applications of Forbes, alleging, in substance and effect, that the NW. $\frac{1}{4}$ of said section 7 is mineral land, and is occupied under mineral locations by protestant and others, and that R. S. Baker was not a purchaser in good faith from the railroad company.

March 3, 1899, Sutherland Hutton *et al.* filed protest, alleging, in substance and effect, that they are the owners of the Hutton oil claim, located August 30, 1883, embracing the SW. $\frac{1}{4}$ of said section 7, and of the Good Venture oil claim, located August 30, 1883, embracing the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section 7; that protestants and their predecessors in interest have been in possession of said claims ever since the date of their locations, and have performed thereon the annual work required by law; that at the time R. S. Baker entered into his contract for the purchase from the railroad company he well knew that the lands in question were mineral lands and valuable for minerals only; that all the lands in said fractional section 7 are very valuable for petroleum, oil, and gas, and have no value for any other purpose; and that said Baker was not a purchaser in good faith from the railroad company.

March 6, 1899, Nathan Cole, Jr., *et al.* and George Perry *et al.* filed separate protests, the former alleging ownership of the Buena Vista placer claim, located January 6, 1898, embracing all of fractional E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section 7, and the latter alleging ownership of the Lofty placer oil claim, located September 6, 1897, embracing all of fractional NE. $\frac{1}{4}$ of said section 7. In other respects the allegations of each of these protests are substantially the same as the allegations of the protest filed by Hutton *et al.*

Upon said protests, and in view of the application by Lyon for mineral patent to all the lands in fractional section 17, a hearing was ordered and had, for the purpose of determining the character of the lands in both sections. The Piru Oil Company, claiming the benefit of the applications of Baker's administrator, was allowed to intervene at the hearing, it having been agreed by the parties that said company is entitled to whatever rights, if any, are found to exist under Baker's purchase from the railroad company.

November 23, 1899, the local officers concurred in finding the lands in section 17 to be mineral in character, but differed in their views as to the lands in section 7. The register found the lands in the latter to be non-mineral, while the receiver found them to be mineral in character. Baker's administrator and the Piru Oil Company appealed from the finding as to section 17 and from the finding of the receiver as to section 7.

June 26, 1900, your office affirmed the concurring findings below as to section 17. As to section 7, the finding of the register was affirmed and that of the receiver rejected. It was further held that the purchase by Baker from the railroad company was made in good faith. But in view of the findings upon the question as to the character of the lands, the application to purchase under the act of 1887 was held for rejection as to the lands in section 17, and for acceptance as to the lands in section 7. The mineral protestants filed a motion for review, but the same was denied, August 22, 1900. All parties, except Lyon, have appealed to the Department.

Baker's administrator and the Piru Oil Company insist that the lands in section 17 should be held to be agricultural in character, as well as those in section 7, while the mineral protestants contend that your office erred in not holding the latter lands to be mineral in character.

The lands in question are within the primary limits of the grant made by the act of July 27, 1866 (14 Stat., 292), in aid of the construction of the Atlantic and Pacific railroad, and are opposite the portion thereof which was unconstructed and the grant appertaining to which was forfeited by act of July 6, 1886 (24 Stat., 123). They are also within the primary limits of the grant made by the act of March 3, 1871 (16 Stat., 573), in aid of the construction of the branch line of the Southern Pacific railroad, and were restored to the public domain September 6, 1898, it having been held in the case of *United States v. Southern Pacific Railroad Company* (168 U. S., 1) that lands similarly situated were excepted from the grant made by the act of March 3, 1871.

Section 5 of the act of March 3, 1887, *supra*, under which the applications by Baker's administrator are made, provides as follows:

That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its

grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the *bona fide* purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said *bona fide* purchaser, his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the *bona fide* occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, and as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further*, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

The grant to the Southern Pacific Railroad Company by the act of March 3, 1871, was upon the same limitations and conditions as was the grant to said company by the act of July 27, 1866 (14 Stat., 292, 299), which was upon the same limitations and conditions as was the grant to the Atlantic and Pacific Railroad Company, made by said last mentioned act, wherein, among other things, it was provided—

That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: *And provided further*, That the word “mineral,” when it occurs in this act, shall not be held to include iron or coal.

The showing made in the proof submitted by Baker's administrator, to the effect (1) that Baker was a citizen of the United States, (2) that he purchased the lands in controversy from the Southern Pacific company, May 16, 1892, as a part of its grant, and that the Piru Oil Company for which he made the purchase is a corporation duly organized and existing under the laws of the State of California, (3) that the lands are of the odd-numbered sections prescribed in the grant, are coterminous with the constructed parts of the railroad company's road, and have never been conveyed to or for the use of the railroad company, (4) that said lands are excepted from the operation of the grant to the railroad company by reason of the exception in said grant of lands theretofore granted to the Atlantic and Pacific Railroad Company, (5) that they were not, at the date of such purchase, in the *bona fide* occupation of adverse claimants under the preemption or homestead laws, whose claims and occupation have not since been voluntarily abandoned, and (6) that they were not settled upon since December 1, 1882, by persons claiming the same under the settlement laws, is not questioned by the protestants or by your office.

In the case of *United States v. Winona and St. Peter Railroad Company* (165 U. S., 463, 480-1) the supreme court, speaking of the act of March 3, 1887, *supra*, among other things, said:

Section 5 of the same act applies to cases in which no certification or patent has been issued, and yet the lands sold by the railroad company are the numbered sections prescribed in its grant and coterminous with the constructed portions of its road, and it is there provided that where the lands so sold by the company "are for any reason excepted from the operation of the grant of said company," the purchaser may obtain title directly from the government by paying to it the ordinary government price of such lands. It is true the term used here is "*bona fide* purchaser," but it is a *bona fide* purchaser from the company, and the description given of the lands, as not conveyed and "for any reason excepted from the operation of the grant," indicates that the fact of notice of defect of title was not to be considered fatal to the right. Congress attempted to protect an honest transaction between a purchaser and a railroad company, even in the absence of a certification or patent. These being the provisions of the act of 1887, the act of 1896, confirming the right and title of a *bona fide* purchaser, and providing that the patent to his lands should not be vacated or annulled, must be held to include one who, if not in the fullest sense a "*bona fide* purchaser," has nevertheless purchased in good faith from the railroad company.

The controlling question presented by the record, therefore, is whether Baker was a purchaser in good faith from the railroad company of the lands in controversy.

The contention is made that this purchase was not in good faith, for the reason that he knew at the time of the purchase that the railroad company's claim to the lands was questioned by the United States, and that a suit setting forth the prior grant to the Atlantic and Pacific Railroad Company, but not mentioning the mineral or non-mineral quality of the land, was then pending in the courts to determine that claim. But Baker is not necessarily chargeable with bad faith because of such knowledge. He was advised by counsel, and believed at the time of his purchase, that the railroad company would win the suit. Having made the purchase in this belief, it can not be said that he acted in bad faith simply because of his knowledge that there were conflicting claims to the lands and that the company's claim was being contested. *United States v. Southern Pacific Railroad Company*, 184 U. S., 49, 54.

To further determine the question of the good faith of Baker's purchase, in view of the protests as to the lands in section 7 and of the assertion of right by Lyon to a mineral patent for the lands in section 17, it is essential to inquire what was the known character of said lands at the date of Baker's purchase. Mineral lands being expressly excluded from the grant to the Southern Pacific company, if the lands here involved were known to be mineral at the date of their purchase from the company by Baker it can not be held that he was a purchaser in good faith. If they were not then known to be mineral lands, no subsequent discovery or development of minerals upon them could affect the question of the good faith of his purchase.

The lands were surveyed in 1880, and those in section 17 were returned by the surveyor-general as containing "deposits of petroleum in considerable quantities." Those in section 7 were returned as non-mineral.

The testimony shows that the lands in both sections are rough, rocky, and mountainous, with scanty soil and little timber of any value upon them, and that they are practically worthless for agricultural purposes. At the time of Baker's purchase from the company, and for many years prior thereto, there existed upon the lands oil springs, oil seepages, asphaltum, and other indications of the presence of oil in them, and they were generally regarded as oil lands and believed to be such by people in that vicinity. Baker believed them to be oil lands, and it was the purpose of the Piru Oil company, for whose benefit the purchase was made, to develop them for oil purposes.

In 1891 the Piru Oil Company, of which Baker was President, made mineral entry No. 123, for lots 41, 42, 43, and 44, known as the Piru oil claims, situated partly in said sections 7 and 17 and partly in the adjoining section 8. Patent was issued upon said entry in 1894. The patent proceedings show that, prior to entry, the Piru company expended \$25,000 in mining improvements upon said claims, which improvements consisted of the erection of machinery and sinking of two wells, one to the depth of 900 feet and the other to the depth of 1100 feet, which were at the time of said entry producing oil. It is shown that certain oil seepages and strata of oil-bearing sandstone and other surface indications of oil which appear on said patented claims extend across both said sections 7 and 17. In section 12 of the adjoining township on the west, which section is immediately west of said section 7, a well producing oil had been sunk by the Sunset Oil Company at the time Baker contracted with the railroad company for the purchase of the lands.

At the date of Baker's purchase no prospecting for minerals had been done on either of said sections 7 or 17, outside the limits of the Piru oil claims aforesaid, and the conditions then existing which tended to show that the lands here in controversy contained deposits of oil were the surface indications aforesaid, and the fact that the immediately adjoining lands had then been demonstrated by the wells aforesaid to contain and be capable of producing oil.

The testimony was not confined to the question of the known character of the lands at the date of Baker's purchase, but was allowed to include the fact that up to the date of the hearing, in May, 1898, many additional wells had been sunk in that immediate vicinity and were then producing oil in large quantities. But no change in the conditions occurring subsequently to the sale by the company to Baker could in any way affect the question of the latter's good faith in the transaction, and the testimony relating to such changed conditions can not be considered in determining that question.

The decision of your office as to the lands in section 7 is accordingly reversed, and as to the lands in section 17, said decision is affirmed. The applications to purchase under section 5 of the act of 1887, are rejected, the protests of the mineral claimants are sustained, and the application by Lyon for mineral patent will be carried to patent, if otherwise free from objection.

CIRCULAR.

WASHINGTON, D. C., *May 12, 1902.*

United States Land Offices.

Attention is called to the following act of Congress, approved April 15, 1902, entitled "An act for the relief of *bona fide* settlers in forest reserves:"

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That where a claimant under the settlement laws of the United States within the limits of a forest reserve created under the provisions of section twenty-four of the act of March third, eighteen hundred and ninety-one, entitled "An act to repeal timber-culture laws, and for other purposes," has failed, by reason of ignorance of the proclamation of the President, or of the filing of the township plat of survey, or from unavoidable accident or conditions, or from misunderstanding of the law, to place his claim of record within the statutory period, such claimant may be permitted within a period of two years from and after the passage of this act to file his claim in the proper United States land office and receive patent therefor upon showing due compliance with the law under which the claim is asserted, notwithstanding the reservation, provided that he made *bona fide* settlement upon the land claimed prior to the date of the proclamation establishing the forest reserve and maintained continuous residence thereon for the requisite period. The benefits of this act shall extend to *bona fide* claims already received by the local land offices after the statutory period, and for which patents have not issued, provided the settlers have complied with the provisions of the law except as to the time of filing their claims.

Settlers, in order to obtain the benefit of this act, must have made *bona fide* settlement upon the land claimed *prior* to the date of the proclamation establishing the forest reserve and maintained continuous residence thereon for the period required by the law under which the claim is asserted.

Applications for entry under the terms of this act must be filed in the local land office within two years from April 15, 1902.

With the application to make entry, the applicant must file an affidavit showing the date of his settlement, and that his residence on the land applied for has been continuous since that date; and that his failure to place his claim of record within the statutory period was due to some one of the reasons set forth in this act.

Bona fide claims which have heretofore been erroneously allowed by the local land officers for lands within forest reserves after the expiration of the statutory period within which to place such claims of record are confirmed by this act, provided the settlers have complied with the provisions of the laws under which the claims were initiated, and that their failure to place their claims of record in proper time is satisfactorily explained as due to causes bringing them within the conditions prescribed in this act. This applies only to claims where settlement was made prior to the creation of the forest reserve.

Very respectfully,

BINGER HERMANN, *Commissioner*.

Approved, May 12, 1902.

E. A. HITCHCOCK, *Secretary of the Interior*.

PRIVATE LAND CLAIM—SMALL-HOLDING—ACT OF MARCH 3, 1891.

INSTRUCTIONS.

Where a small-holding claimant within the provisions of sections 16, 17 and 18 of the act of March 3, 1891, has filed his claim and made due proof thereof in conformity with said sections and the regulations issued thereunder, and is fully entitled to a patent therefor, at the date of the decree of the Court of Private Land Claims confirming a private land grant in conflict therewith, the lands embraced in such claim must be held to be disposed of or granted by the United States, within the meaning of the provisions of sections 8 and 14 of said act, and excepted from the operation and effect of the decree of confirmation.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *May 14, 1902.* (E. F. B.)

The Department is in receipt of your letter of April 10, 1902, submitting for its consideration a statement relative to the conflict between certain small-holding claims upon which final proofs have been made under the 16th, 17th and 18th sections of the act of March 3, 1891 (26 Stat., 854), and the San Antonio de las Huertas grant,

which has recently been surveyed under a confirmatory decree of the Court of Private Land Claims.

You state that the proofs in these cases were made six years ago, at which time the San Antonio de las Huertas grant had neither been confirmed nor surveyed, but that the issuance of patent upon said claims was suspended because it appeared from the depositions in support of some of the claims that the parties claimed under persons who were alleged to be the original settlers of said grant. You also state that the court found that by virtue of the grant and the act of juridical possession the lands were severed from the public domain and became the property of the original grantees, their heirs and assigns.

While it appears from the finding and decree of the court that the United States at no time had any title to the land covered by said grant and could make no disposition thereof, yet, in view of the fact that Congress, by the fourteenth section of the act of March 3, 1891, *supra*, protected the right of persons to whom the United States may have sold or granted any of the lands embraced within the limits of a grant decreed to any claimant under the provisions of said act, you recommend that patents should be issued to the claimants who have established the right to a title under sections sixteen, seventeen and eighteen of said act of March 3, 1891, to the tracts found to be within the limits of this grant or of other grants which have been confirmed or surveyed subsequent to the issue of final proof papers by the local officers.

The grant in question was confirmed by the Court of Private Land Claims under authority of section 8 of said act of March 3, 1891, which gave to all persons claiming lands in the States and Territories therein named, under titles derived from the Spanish or Mexican government, that were complete and perfect at the date of the transfer of sovereignty to the United States, the right to apply to said court for confirmation of such title upon the condition that—

if in any such case a title so claimed to be perfect shall be established and confirmed, such confirmation shall be for so much land only as such perfect title shall be found to cover, always excepting any part of such land that shall have been disposed of by the United States, and always subject to and not to affect any conflicting private interests, rights, or claims held or claimed adversely to any such claim or title, or adversely to the holder of any such claim or title.

Said provision was made for the purpose of protecting the right and claim of persons to lands lying within the limits of such grants which the United States may have disposed of as public land, because of the lack of knowledge of the locus of such claims. To compensate for the loss to the grant the act by the fourteenth section provided—

That if in any case it shall appear that the lands or any part thereof decreed to any claimant under the provisions of this act shall have been sold or granted by the United States to any other person, such title from the United States to such other

person shall remain valid, notwithstanding such decree, and upon proof being made to the satisfaction of said court of such sale or grant, and the value of the land so sold or granted, such court shall render judgment in favor of such claimant against the United States for the reasonable value of said lands so sold or granted, exclusive of betterments, not exceeding one dollar and twenty-five cents per acre for such lands; and such judgment, when found, shall be a charge on the Treasury of the United States.

The question as to the right of persons claiming under the United States against the owners of a grant confirmed under the eighth section of said act, was involved in the case of *Juan de la Cruz Trujillo*, decided by the department June 23, 1899 (28 L. D., 544). In that case it was said:

These claimants were not bound to apply to said court for confirmation of their title, but having invoked the jurisdiction of the court for that purpose, they were bound by all of the provisions of the act, and in accepting its benefits they consented that, if any part of the lands decreed to them under the provisions of said act "shall have been sold or granted by the United States to any other person, such title from the United States to such other person shall remain valid, notwithstanding such decree," and that they will accept from the United States in lieu thereof the reasonable value of said land, not exceeding one dollar and twenty-five cents per acre.

It was held that it was not the intention of the act to except from confirmation any lands that had not been sold or granted by the United States, as the grant claimants would be entitled to compensation only for such lands as the government had "disposed of," which means a final and permanent divestiture of whatever title the United States may have had, or the incurrence of an obligation to convey such title.

In that case the claimant under the United States had acquired no vested right as against the government and the United States was not bound to make good his entry, but in the case of *confirmees of Duran de Chavez Grant v. Saabedra* (23 L. D., 193) it was held that the land embraced in the homestead entry of Saabedra was excepted from the decree of confirmation in favor of the homesteader, as the issuance of the receiver's receipt and register's final certificate prior to the decree of the Court of Private Land Claims, vested in him an equitable title to the land which was validated by the express terms of the act. It was there said:

The issuance of final certificate to Saabedra for said tract amounted to a sale or grant thereof within the meaning and intent of the language quoted. Such certificate vested a right to patent, or in other words, an equitable title, in him for all the interests of the United States in said tract (*Simmons v. Wagner*, 101 U. S., 260; *Deffebach v. Hawke*, 115 U. S., 392; and *Cornelius v. Kessel*, 128 U. S., 456).

It is the opinion of the Department that in any instance where, upon investigation by your office, it appears that, at the date of the decree of confirmation by the Court of Private Land Claims, the small-holding claimant was within the provisions of sections 16, 17, and 18 of the act of March 3, 1891, and had filed his claim and made due proof thereof in conformity with said sections and the regulations

issued thereunder, and in consequence was at the time of said decree fully entitled to a patent, the lands embraced in such small-holding claim must be held to have been disposed of or granted by the United States within the meaning of the provisions in sections 8 and 14, hereinbefore quoted, and to be excepted from the operation and effect of the decree of confirmation.

It is apprehended that your office will find no difficulty in applying the rule here announced to the small-holding claims of the kind referred to in your office letter. The matter is one in which the holder of the confirmed grant is interested and entitled to be heard; and your office will therefore, before disposing of any such small-holding claim, afford the claimant to the confirmed grant due opportunity to be heard.

SCHOOL LAND—INDEMNITY SELECTION—SWAMP LAND.

STATE OF CALIFORNIA.

The act of March 3, 1853, granting sections sixteen and thirty-six in each township to the State of California for school purposes, and the act of February 28, 1891, granting indemnity for such sections where they are "mineral land, or are within any Indian, military, or other reservation, or are otherwise disposed of by the United States," are *in pari materia*, and should be construed as one act.

Where any sections sixteen or thirty-six were swamp and overflowed and passed to the State under the grant made by the act of September 28, 1850, they are "disposed of by the United States" within the meaning of the act of February 28, 1891, and the State is entitled to indemnity therefor.

State of California, 15 L. D., 10, and State of California v. Moccettini, 19 L. D., 359, overruled.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *May 26, 1902.* (G. B. G.)

This is the appeal of the State of California from your office decision of August 3, 1901, holding for cancellation the State's selections Nos. 3520 to 3527, inclusive (R. and R. No. 466), embracing 4910.65 acres of land, in lieu of certain sections sixteen and thirty-six which were granted to the State as swamp lands by the act of September 28, 1850 (9 Stat., 519).

These selections were avowedly made under the act of March 3, 1853 (10 Stat., 244), section 6 of which declares that all public lands in the State of California, whether surveyed or unsurveyed, shall be subject to pre-emption, "with the exception of sections sixteen and thirty-six, which shall be and hereby are granted to the State for the purposes of public schools in each township," and section 7 of which provides:

That where any settlement, by the erection of a dwelling house or the cultivation of any portion of the land, shall be made upon the sixteenth or thirty-sixth sections, before the same shall be surveyed, or where such sections may be reserved for public uses or taken by private claims, other lands shall be selected by the proper authorities in lieu thereof;—

the act of February 26, 1859 (11 Stat., 385), appropriating lands to compensate deficiencies for school purposes where sections sixteen and thirty-six have been settled upon with a view to pre-emption before the survey of the lands in the field, and where said sections are fractional in quantity, or where one or both are wanting "by reason of the township being fractional, or from any natural cause whatever," and providing that the lands so appropriated shall be selected and appropriated in accordance with the principles of adjustment and the provisions of the act of May 20, 1826 (4 Stat., 179); the act of July 23, 1866 (14 Stat., 218), section 6 of which provides, among other things, that the act of March 3, 1853, *supra*, "shall be construed as giving the State of California the right to select for school purposes other lands in lieu of such sixteenth and thirty-sixth sections, as were settled upon prior to survey, reserved for public uses, covered by grants made under Spanish or Mexican authority, or by other private claims;" and the act of February 28, 1891 (26 Stat., 796), amending section 2275 of the Revised Statutes to read as follows:

Sec. 2275. Where settlements with a view to pre-emption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by pre-emption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: *Provided*, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever." And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships, in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservations: *Provided, however*, That nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein; but nothing in this proviso shall be construed as conferring any right not now existing.

The action of your office is put upon the ground that the State is not entitled to indemnity for sections sixteen and thirty-six where

such sections had been granted to the State as swamp lands, and the case of the State of California (15 L. D., 10), and the circular of instructions issued by your office to registers and receivers, October 10, 1893, which received the approval of the Department December 19, 1893 (17 L. D., 576), are relied on in support of the conclusion reached.

The State contends:

First. That the swamp-land grant being for another and distinct purpose and thereby wholly distinguished from the later grant to California in aid of common schools, sections 16 and 36, found to fall within the swamp-land grant, are in fact and law lands "otherwise disposed of" and for which indemnity is expressly provided by the act of February 28, 1891, *supra*.

Second. The act of February 26, 1859, now Section 2275 U. S. Revised Statutes, and the act of February 28, 1891, amendatory thereof, are each and all applicable to the State of California, both by express terms and clear intentment, and the Department has long so applied these statutes to and for the benefit of the school-land grant made to California.

Third. The former decision holding *contra* is erroneous, and neither on principle nor as controlling precedent sustains the Commissioner's present ruling.

There is nothing in the indemnity clause of the act March 3, 1853, nothing in the acts of February 26, 1859, and July 23, 1866, and nothing in section 2275 of the Revised Statutes prior to its amendment, which justifies these selections. If, therefore, the State is entitled to this indemnity, it is by reason of the act of February 28, 1891, *supra*, and especially that clause of this act which appropriates and grants other lands of equal acreage where sections sixteen and thirty-six "are otherwise disposed of by the United States."

In the case of the State of California (15 L. D., 10, 18-19), it was held that the act of February 28, 1891—

did not give additional indemnity rights—its indemnity provisions merely enunciated existing laws.

If, as above shown, the act of 1859 (section 2275) is not applicable in its indemnity school provisions to California, it can not be said that the section, as amended, applies to that State, unless the State is specially designated.

As above seen, to apply the amended section to California and award indemnity for lands "otherwise disposed of" would result in giving the State indemnity for sections sixteen and thirty-six when swamp. It would be to give the State indemnity for a class of lands already donated to the State.

The principle upon which indemnity is given to a State is for a loss; it is not given for that which the State has already received. Moreover, it is not presumed that Congress intended a grant of lands for California in excess of existing provisions for other States; and I do not feel justified in so holding on the authority contended for.

I therefore conclude that the clause, "or otherwise disposed of by the United States," found in section 2275, as amended, does not authorize new or future selections in California on the basis of sections sixteen or thirty-six when swamp.

There is much in this that is erroneous.

Section 2275 of the Revised Statutes was the then existing *general* law governing the selection of school indemnity lands. The act of July 23, 1866, construing and enlarging the indemnity provisions of

the act of March 3, 1853, was a special act, applying alone to the State of California. This section and this act, therefore, constituted the "existing laws" governing the selection of school indemnity lands in the State of California. These gave the right to indemnity in instances (1) where sections sixteen and thirty-six had been settled upon before the survey of the land in the field, with a view to pre-emption; (2) where said sections are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever; and (3) where they are reserved for public uses, or are covered by private land claims.

The act of February 28, 1891, extended the indemnity right so as to embrace, in addition to those prescribed by the then existing law, instances (1) where sections sixteen and thirty-six are mineral land, and (2) where they "are otherwise disposed of by the United States." It was manifestly erroneous, therefore, to hold that the indemnity provisions of said act merely enunciated existing law, since no law then in existence permitted indemnity for mineral land or for lands which had been disposed of by the United States, otherwise than in the ways mentioned. But the conclusion reached by the Department in that case seems to have been based upon the assumption that section 2275 of the Revised Statutes was a codification of the act of February 26, 1859, that this act had no application to the State of California, that therefore said section 2275 did not apply to that State, and that of necessity the act of February 28, 1891, amending said section, is without application. The premise upon which this reasoning is based is altogether erroneous. Section 2275 was a codification of the act of May 20, 1826 (4 Stat., 179), as well as the act of February 26, 1859. These were both general acts. There is nothing in the act of 1859 upon which to base an argument that it was not intended to apply to the State of California. It is true that the act of March 3, 1853, providing for the survey and disposal of public lands in California provides that in segregating large bodies of land notoriously and obviously swamp and overflowed it shall not be necessary to subdivide the same, but only to run the exterior lines thereof, and it seems to have been concluded from this that, inasmuch as the indemnity granted by the act of February 26, 1859, could only be claimed after the survey of sections sixteen and thirty-six, the act did not apply to California. Of this it is enough to say that though it be conceded that there were instances where the act would be without operative effect, it does not follow that the act did not apply to said State. But, aside from all this, it is now well settled that the act of February 28, 1891, is a general act, and, specifically, that it applies to the State of California.

In the case of the State of California (23 L. D., 423), it was held that the State was entitled under said act to select school land indemnity for sections sixteen and thirty-six lost to the State by reason of their mineral character, and to the extent that the said case of the

State of California (15 L. D., 10) was in conflict with this view it was expressly overruled. And it was further held, generally, that in passing said act Congress intended that it should be applicable to all public-land States alike, and "intended that it should operate as a repeal of all special laws theretofore passed, in so far as they conflicted with its provisions." The same view was taken by the Department in the later case of the State of Wyoming (27 L. D., 35). See also State of Florida (30 L. D., 187), and *Johnston v. Morris* (72 Fed. Rep., 890).

It results that, if the sections sixteen and thirty-six designated as bases for these selections "are otherwise disposed of by the United States," within the meaning of this language as used in the act of February 28, 1891, the selections should be approved.

Whether this language means disposed of in a different manner than thereinbefore mentioned, or "otherwise" than contemplated by the granting act, is not material. In either case it necessarily means, that if sections sixteen and thirty-six have at the date of survey been disposed of by the United States, the State shall be entitled to indemnity. There is nothing in the conditions surrounding these lands which justifies imputing to Congress a different intention from that which seems to be clearly expressed. The conditions in California are unique. This territory was acquired from Mexico by the treaty of February 2, 1848 (see 9 Stat., 922). It was admitted to the Union as a State September 9, 1850 (9 Stat., 452), and without an antecedent territorial government. No reservation or grant of school lands was made by the enabling act, and none existed at the date of the swamp-land grant of September 28, 1850. That grant applied to the State of California, and operated as of that date to transfer to the State all of the swamp and overflowed lands therein, including sections sixteen and thirty-six. This was surely a disposition by the United States of all such lands. *Wright v. Roseberry* (121 U. S., 497). The school grant (*supra*) does not except these lands; they were intended, therefore, as part of the school grant, and would have been such but for the fact that they were not then the property of the United States. Congress intended that the State should have all of the swamp and overflowed lands within its limits, and imposed upon the State the duty of reclaiming these lands. It also intended that the State should have the sixteenth and thirty-sixth sections in every township therein for the support of schools. And the fact that in some instances these grants conflicted furnishes no sufficient argument for the conclusion that the State should not have indemnity for lands lost to its school grant by reason of such conflicts. This view finds support in the decision of the supreme court of the United States in the case of the *Winona and St. Peter Railroad Company v. Barney and others* (113 U. S., 618). In that case the court had under consideration the grant made by the act of March 3, 1857 (11 Stat., 195), to the Territory of Minnesota, to aid in the construction of certain railroads. The indem-

nity clause of said act gave a right of selection where it appeared that the United States had at the date of the definite location of the roads sold any of the lands granted, or where the right of pre-emption had attached to the same. It was held that this indemnity clause covers losses from the grant by reason of sales and the attachment of pre-emption rights previous to the date of the act. At page 626 of the decision the court said:

It is to no purpose to say, against this construction, that the government could not grant what it did not own, and therefore could not have intended that its language should apply to lands which it had disposed of. As already said, the whole act must be read to reach the intention of the law-maker. It uses, indeed, words of grant, words which purport to convey what the grantor owns, and, of course, cannot operate upon lands with which the grantor had parted; and, therefore, when it afterwards provides for indemnity for lost portions of the lands "granted as aforesaid," it means of the lands purporting to be covered by those terms.

The act of March 3, 1853, granting sections sixteen and thirty-six to the State of California, and the act of February 28, 1891, are *in pari materia*, and should be construed as one act. So construed, it results that the State is entitled to indemnity for said sections where the United States had prior to the school grant "disposed" of these sections.

In the case of the St. Paul, Minneapolis and Omaha Railway Company (6 L. D., 195), it was held by the Department that lands granted to the State of Wisconsin by the swamp-land act were "sold," "reserved," "otherwise appropriated," or "otherwise disposed of" within the meaning of the acts of June 3, 1856 (11 Stat., 20), and May 5, 1864 (13 Stat., 66), granting to said State certain lands designated by odd-numbers to aid in the construction of railroads in that State, and providing for indemnity on account of lands which had been sold, reserved, or otherwise appropriated at the date of the definite location of the road. There is no difference in principle in the case cited and that now under consideration. In both instances the grant on account of which the loss occurred and the grant in which it occurred were made to the State. In the case cited an obligation rested on the State to build the road on account of which the grant was made, and in this case an obligation rested on the State to reclaim the land. The object in each was the same, in that both grants were made for the purpose of internal improvement. It is true of the swamp grant that the obligation resting upon the State was a moral one only, but this is not important. It is submitted by counsel for the State that the theory and purpose of the grant of swamp lands to the State were such that lands were worthless in their natural conditions; that they were an obstacle to the proper growth and a menace to the health of the local communities; that their reclamation by local authority under stimulus of local necessity was a work worth their full value when reclaimed; and they were given to the states for reclamation as valueless in their present condition, and involving their full

value in the work of reclamation. It is submitted further that the school grant was for a widely different object, and to attain a widely different end; that it was for "the purposes of public schools *in each township*," and that the consistent legislation upon this subject shows the congressional intention as to each State to devote the school section *solely* to the benefit of the schools in *that* township wherein they were situated.

If there were doubt of the congressional intention as expressed in the act of February 28, 1891, this argument would be worthy of extended consideration. It is enough to say of it, however, that it is well supported by the history of legislation on these subjects. But this case does not need to rest on equitable grounds. The letter of the law, the terms of the acts of March 3, 1853, and February 28, 1891, support the State's main contention. Congress must be presumed to have known when it made the grant of March 3, 1853, that it had already disposed of a large body of lands in the State by the swamp-land grant, and that in all probability some sections sixteen and thirty-six therein had been so disposed of. It must also be presumed to have known when it passed the indemnity act of February 28, 1891, that such sixteenth and thirty-sixth sections in said State as were on September 28, 1850, swamp lands were lost to the school grant, because they had been otherwise disposed of by the United States, and, in granting indemnity for such lands, no exception was made of the State of California. There is no rule of statutory construction which supplies such an exception. The legal effect which follows from the plain language of a statute may not be defeated by construction. On principle and authority the State is entitled to an approval of these lists. The cases of the State of California (15 L. D., 10), and State of California *v.* Moccettini (19 L. D., 359), are hereby overruled.

The decision appealed from is reversed, with directions to re-examine the lists and submit them for approval, unless other objection appears.

NEW MEXICO—LEASE—PROTEST.

LYONS AND CAMPBELL RANCH AND CATTLE CO. *v.* STOCKTON.

Under a stipulation in a lease by the Territory of New Mexico that the Board of Public Lands of said Territory shall have the power to at any time try and determine the question whether the lease was procured through false and fraudulent representations, said board has authority, without the intervention of a court, to terminate the lease upon a satisfactory showing that it was so procured.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *May 29, 1902.* (G. B. G.)

This is the matter of the protest of the Lyons and Campbell Ranch and Cattle Company against the approval of lease No. 354 to William J. Stockton, for the N. $\frac{1}{2}$, SW. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$

of the SE. $\frac{1}{4}$ of Sec. 36, T. 13 S., R. 21 W., in the Territory of New Mexico.

This lease was submitted to the Department by your office for approval April 25, 1902, but was returned for the further consideration of your office because of the protest of the Lyons and Campbell Ranch and Cattle Company. Your office, upon consideration of said protest, reports that this land was embraced in lease No. 426 to one Thomas Lyons, which was approved by the Department March 2, 1901, that this lease was made by and between The Board of Public Lands of the Territory of New Mexico, party of the first part, and Thomas Lyons, party of the second part, and contained the following clause:

If at any time after the execution of this lease, it is shown to the satisfaction of the party of the first part, or its successors in office, that there has been any fraud or collusion upon the part of the said party of the second part to obtain this lease at a less rental than its value, it shall be null and void at the option of the party of the first part.

It appears from the files of your office appertaining to this matter that from representations made to the Board of Public Lands this land had living or running water upon it, whereas the said Lyons, in his application to lease the same, had represented that there was no living or running water thereon. The board caused an investigation to be made, and Lyons was cited to show cause why his lease should not be canceled under the clause therein above quoted. A showing was made by affidavits, in response to such notice, and upon consideration thereof the board declared the lease canceled, and subsequently leased the land to Stockton, which lease is now before the Department for approval.

Your office expresses the opinion that, inasmuch as the lease as drawn would appear to leave it to the board to determine at any time whether or not any contract actually exists, the condition is so lacking in mutuality as to make it inoperative, and recommends that the approval of the lease to Stockton be withheld.

It was evidently the intention of the parties to this agreement to stipulate that the Board of Public Lands of the Territory should have the power at any time to try and determine, without the intervention of a court, the question whether the lease had been procured through false and fraudulent representation, and in the event it should appear to the satisfaction of the board that such false and fraudulent representations had been made to authorize the board to terminate the lease. If this was not the intention, then the clause quoted was nothing more than a declaration of the law, because a contract secured through fraud may always be annulled at the option of the party defrauded, though the annulment must ordinarily be secured through civil process.

Whether an agreement between parties to a contract that one of them should have the power to try and determine the question of fraud in its execution is binding need not be considered. That question is not here presented. The Board of Public Lands is the nominal and not the real party in interest. The real party of the first part in this contract is the Territory of New Mexico, and no good reason is suggested why the Territory and its lessee may not agree to submit to the Board of Public Lands, as a board of arbitration, any question arising upon the leasing of these lands, which, in the absence of such an agreement, might have been tried and determined by a court of competent jurisdiction. It is believed that this board had the power to terminate lease No. 426, and the sufficiency of the evidence upon which that action was taken is not a question for review by this Department. Lease No. 354 to William J. Stockton, which has been informally withdrawn from the files of your office incident to consideration of this matter, is herewith returned with the approval of the Department noted thereon.

CONTEST—INDIAN ALLOTMENT—PREFERENCE RIGHT.

COLLINS *v.* HOYT.

Section 2 of the act of May 14, 1880, giving a preference right of entry to a successful contestant, does not extend to contests against Indian allotments.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *May 29, 1902.* (C. J. G.)

Plaintiff in the case entitled Peter M. Collins *v.* Elijah W. Hoyt, appeals from the decision of your office of December 30, 1901, rejecting his application to enter, under section 2306 of the Revised Statutes, the W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 24, T. 15 N., R. 12 W., Helena, Montana, land district. The application is based on a claimed preference right to make additional entry for this land procured by plaintiff's contest against an Indian allotment covering said land, which resulted in its cancellation.

Section 2 of the act of May 14, 1880 (21 Stat., 140), allowing a preference right of entry to a successful contestant, has been construed not to extend to an Indian allotment where the first or trust patent has been issued. *Bryant et al. v. Gill et al.* (29 L. D., 68); *Lizzie Bergen* (30 L. D., 258, 266); and Rule 6, Regulations of April 10, 1901 (30 L. D., 546). There would appear to be no good reason why the same rule should not apply in case of an allotment where the first or trust patent has not been issued; and this, too, regardless of the nature or character of the charges preferred by the contest. It is so held.

Your said office decision is affirmed.

PRIVATE CLAIM—SCRIP—ACT OF JUNE 2, 1858.

GEORGE BALDEY.

The necessity for the sale of a decedent's property, whether real or personal, in the State of Alabama, is a jurisdictional fact that must appear upon the face of the record; and an order of sale, by a probate court, founded upon an application which does not allege or show that any legal cause for the sale exists, is a nullity and affords no basis for favorable action in proceedings to secure the issuance of scrip under the act of June 2, 1858.

No lands were granted by the third section of the act of March 3, 1819, which were claimed or recognized by the preceding sections of the act, and it is therefore necessary to identify the land claimed under the third section and to show that it does not conflict with any claim confirmed by the first or second section.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *May 29, 1902.* (E. F. B.)

With your letter of March 25, 1902, you transmit the appeal of George Baldey from the decision of your office of November 26, 1901, denying his application for the issuance of scrip under the act of June 2, 1858 (11 Stat., 294), in satisfaction of the private land claim of Eloise T. Innerarrity, reported by Commissioner Crawford in report No. 6, as claim No. 3, in the register of claims to lands in the district east of Pearl River, "founded on orders of survey (requettes), permission to settle, or other written evidence of claim . . . which in the opinion of the commissioner ought not to be confirmed." (3 Am. St. Papers, Green, 14.)

Appellant contends that said claim was confirmed by the third section of the act of March 3, 1819 (3 Stat., 528), that it has never been located, surveyed or in any other way satisfied, and that he is the legal representative of said claim, having purchased it from the administrator of the estate of Eloise T. Innerarrity, at a public sale authorized by the probate court in the State of Alabama having jurisdiction thereof.

You rejected the application upon the ground that the probate court had no authority to order the sale of said estate and that the purchaser acquired no title thereunder, for the reason (1) that if Eloise T. Innerarrity acquired any right under the confirmatory act of March 3, 1819, *supra*, it was a claim to real property which descended to her heirs; (2) that if the claim be considered as personal property it could only be sold for the purposes specified in the statute, and the jurisdictional fact not appearing on the face of the petition, the order of the court was void and of no effect; and (3) because it has not been affirmatively shown that the claim was confirmed, the applicant having failed to identify the land or to show the approximate locus of the claim. The applicant alleges error in all of said rulings.

The third section of the act of March 3, 1819, *supra*, provides that every person, or his or her legal representatives, whose claim is comprised in the list or register of claims reported by the commissioners,

shall be entitled to a grant for the land so claimed, not exceeding six hundred and forty acres, as a donation, where it appears from said reports that the land claimed had been actually inhabited and cultivated by such person or persons in whose right he claims, on or before April 15, 1813, with the proviso that no lands shall be thus granted which are claimed or recognized by the preceding sections of the act.

If this claim did not come within the proviso and if the claimant acquired any right whatever under said section, the right thus-acquired was a grant to the specific tract settled upon and to no other land. The grant operated to convey, as against the United States, all the right, title and interest to the land settled upon and claimed and a sale of such claim is a sale of realty.

The act of June 2, 1858, *supra*, which authorizes the surveyor-general to issue certificates of location for a quantity of land equal to that confirmed where the claim has not been located and remains unsatisfied, did not change the character of the claim but only authorized the taking of other lands in lieu thereof. That act requires that satisfactory proof be made to the surveyor-general that the claim has been confirmed and that the whole or part thereof remains unsatisfied. When these facts have been found by the surveyor-general it is his duty to issue a certificate authorizing the location of a quantity of land equal to that so confirmed, which, when accepted by the confirmer or his legal representatives, is taken in lieu of the tract confirmed, and all right, title, interest and claim to the confirmed tract is forever relinquished and the certificate for the location of other land is accepted in lieu of it. Neither Eloise T. Innerarity while in life, nor her heirs after her death, ever relinquished their claim to the tract settled upon and never made an application for a certificate under the act of June 2, 1858, or offered to accept such certificate in lieu of the claim. Whatever claim was confirmed by the act of March 3, 1819, was existing and unimpaired when the administrator of Innerarity petitioned and obtained an order for the sale of it.

The petition and the order of the court under which the property was offered for sale do not conform to the statutory requirements, in the State of Alabama, for the sale of the real estate of a decedent. Section 156, Civil Code of Alabama (1896), provides that "in case of intestacy, lands may be sold by the administrator for the payment of debts, when the personal property is insufficient therefor," and section 157 provides that "lands of an estate may be sold by order of the probate court having jurisdiction of the estate, where the same can not be equitably divided among the heirs or devisees."

Among other provisions, the civil code of 1896 (section 162) provides that if it be averred in an application for the sale of lands for the payment of debts or for distribution that the names of any of the heirs are unknown, the court must make publication as in the case of

non-residents, and must appoint a competent and disinterested person to represent such unknown parties.

As to the power to order a sale of the property of a decedent, probate courts in the State of Alabama are courts of limited or special jurisdiction.

The necessity for the sale of a decedent's property is a jurisdictional fact that must appear upon the face of the record and the ascertainment of such fact can not be inferred from the mere exercise of jurisdiction by the court. "An order of sale which does not appear to have been founded on such an application and which does not allege or show that any legal cause for the sale existed is a nullity." *Hall v. Chapman*, Adm'r, 35 Ala., 553, 557; citing *Wyatt's Adm'r v. Rambo*, 29 Ala., 510; *Ikellheimer v. Chapman*, 32 Ala., 676; *Hatcher v. Clifton*, 33 Ala., 301; *King v. Kemp*, 29 Ala., 542.

In *Wyatt's Adm'r v. Rambo*, *supra*, the court said:

From the decisions of this court, collected and cited above, it will be found that there is a long chain of cases, uniformly maintaining that the orphans' court was a court of limited or special jurisdiction; that therefore, to the validity of its judgments, it is necessary that its jurisdiction should be shown in each case, upon the face of its proceedings; and, that the facts necessary to support the jurisdiction will not be supplied by intentment. The cases are in irreconcilable conflict with the doctrine of *Wyatt v. Steele*, *supra*, that the exercise of jurisdiction implies the previous ascertainment of the jurisdictional fact.

In the petition for the granting of letters of administration it is alleged by the petitioner that he does not know whether the decedent left a will nor who are the next of kin of said decedent, or other persons, if any, who may be entitled to said estate. In his petition for the sale of the property he alleges that the estate is solvent and that the personal property can not be fairly distributed among the distributees of said estate without a sale thereof, and that the distributees of said estate are to petitioner unknown and can not be found after diligent search. Yet he asks that an order be granted for the sale of such property "for the purpose of a distribution among the said distributees," notwithstanding he does not know of any person or persons entitled to such distribution.

In *Avery's Adm'r v. Avery's heirs*, 47 Ala., 509, an application for leave to sell the property of a decedent for distribution was held to be insufficient in failing to allege that some one of the heirs of the estate desired a distribution; that if the estate is solvent the power to sell for the payment of debts is gone, the land becoming the absolute and uncharged property of the heirs, and in such cases the administrator is not bound to distribute the land unless he is requested to do so by some of the heirs. In *Snedicor v. Mobley*, *ib.*, 505, it was held that (syllabus)—

the probate court has no jurisdiction to order a sale of real estate belonging to a decedent for the purpose of making an equitable division among the heirs or devisees where the facts stated in the petition negative the existence of the ground on which the sale is asked.

Not only does it not appear from the petition in this case, and the order founded thereon, that there was any necessity for the sale of said property, but the facts stated therein negative the existence of the ground on which the sale is asked and show that the proceedings were initiated by an interloper having no interest whatever in said estate or in the distributees thereof.

But even if it be conceded that the estate of Innerarity at the time of the application for leave to sell, consisted of a right to a certificate of location under the act of June 2, 1858, in lieu of an unlocated and unsatisfied confirmed claim, and that such property was subject to sale for the payment of debts of the estate as personal property under the laws of Alabama, it would not affect the question, as the jurisdiction of probate courts in the State of Alabama to order a sale of the property belonging to a decedent's estate (whether real or personal) is derived solely from the statute and can not be exercised except for the purposes authorized by the statute. Section 142 of the Civil Code of Alabama provides that any part of the personal property of a decedent, including land warrants, may be sold by order of the court in the following cases: (1) For the payment of debts; (2) to make distribution among the distributees or legatees; and (3) to prevent waste or destruction of property liable to waste or of a perishable nature.

The jurisdiction of the probate courts being limited or special, they have no authority to order the sale of the personal property of a decedent's estate, except upon the statutory grounds, and, as in the case of realty, the petition must affirmatively show the facts necessary to sustain its jurisdiction. They can not be inferred from the mere exercise of jurisdiction. *Hall v. Chapman, supra*, and authorities cited.

The contention of the appellant that the sale was authorized by the statute for the reason that property escheats to the State if there are no lawful heirs capable of inheriting, can not be maintained, as the sale of this property was not made in the manner provided by the statute for the sale of property that escheats to the State.

Your holding that the application should also be rejected upon the ground that it has not been affirmatively shown that the claim was confirmed by the United States, because of the failure to identify the land, is in accordance with the ruling of the Department (*D. C. Hardee, 7 L. D., 1*). No lands were granted by the third section of the act of March 3, 1819, which were claimed or recognized by the preceding sections of the act. It is therefore necessary to identify the land or to establish at least the approximate location of the claim, as its confirmation depends upon a showing that it does not conflict with any claim confirmed by either the first or second section of the act.

Your decision is affirmed.

PATENT—LOUISIANA AGRICULTURAL AND MECHANICAL COLLEGE.

INSTRUCTIONS.

Where an act of Congress directs the Secretary of the Interior to transfer title to public land, without specifically providing by what means the transfer shall be made, patent therefor will be issued in the usual manner.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) June 3, 1902. (V. B.)

I am in receipt of your office letter of May 8, 1902, relative to the transfer of title to the military reservation at Baton Rouge, Louisiana, in accordance with the provisions of the act of Congress of April 28, 1902 (Public—No 85), and asking instructions as to the proper course of carrying out the provisions of said act, which is as follows:

That the Secretary of the Interior be, and he is hereby authorized and directed to transfer to the Louisiana State University and Agricultural and Mechanical College at Baton Rouge, Louisiana, full and complete title to the buildings and grounds of the United States barracks at Baton Rouge for the purposes of said university and college, except that portion of said ground that lies westward of a line one hundred feet east of the center of the railroad track of the Louisville, New Orleans and Texas Railroad Company, and said excepted land may be used and occupied by said railroad company, and should said railroad cease to use and occupy said land then the title shall revert to said university.

The possession of said reservation and the buildings thereon was transferred August 27, 1886, to the State of Louisiana, for the purposes of said university and college, in pursuance of the provisions of the act of July 12, 1886 (24 Stat., 144), but the fee simple title thereto remained in the United States, and the undoubted purpose of Congress, as disclosed by the act of April, 1902, was to transfer that title, so that the beneficiaries named in the act should have full and complete title to, and enjoyment of, the described property.

The general rule is that patent from the government is necessary in order to transfer the fee simple title of any of the public lands. (Carter v. Ruddy, 166 U. S., 493; Revised Statutes, Sections 453 and 458.) By sections 441, 453, and 2478 of the Revised Statutes the Secretary of the Interior is charged with supervising the execution and administration of the public land laws (Knight v. U. S. Land Association, 142 U. S., 161, 177; Catholic Bishop of Nesqually v. Gibbon, 158 U. S., 155, 167). Patents are executed in the name of the President by a secretary appointed for that purpose (Rev. Stat., Sections 450 and 451). In actual practice the President is prevented, by the exacting duties of his office, from giving personal attention to the issuing of patents, and in consequence the direction of the Secretary of the Interior in that matter is deemed to be the direction of the President (Wilcox v. Jackson, 13 Peters, 498, 511, 513; Wolsey v.

Chapman, 101 U. S., 755, 769). The act under consideration was passed with a full understanding of the existing practice, and instead of indicating an intent to depart therefrom in this instance, is in entire harmony therewith. A patent will therefore be issued in the usual manner.

The legislature of Louisiana, by act 145 of 1876 (Revised Laws of Louisiana, 1897, page 336), consolidated the Louisiana State University and the Louisiana State Agricultural and Mechanical College into one institution to be known as the Louisiana State University and Agricultural and Mechanical College, and located the same at the city of Baton Rouge. By section 5 of said act, the consolidated institution was placed under the control and direction of a board of supervisors, *who were created a body corporate under the style and name of the Board of Supervisors of the Louisiana State University, etc.*, and said board is authorized, among other things, "to receive all donations" in trust for said institution. Section 23 of the act provides also that the said State, in its corporate capacity, may take by grant or gift any property and hold the same for the use of said institution.

Section 24 authorizes the Board of Supervisors also to take by grant or gift any property, for the use of said consolidated institution, and to administer the same as prescribed in the grant; but in section 11 of said act it is declared that the title to all property held by said institution shall vest in the state and not be liable to seizure and sale for debt.

It thus appears from the cited legislation that in order to carry out the purposes of the act of 1902 the transfer of title to the property must be made either direct to the State or to the Board of Supervisors in their corporate name, but may be made to either.

As a conveyance to the Board or Supervisors in its corporate name will be a literal compliance with the act of Congress and will, in effect, vest the title of the property in the State, it would seem to be well to adopt the suggestion of your office and transfer the title to that body.

HOMESTEAD—SOLDIERS' ADDITIONAL—SEC. 2, ACT OF JUNE 8, 1872.

SIERRA LUMBER COMPANY.

A soldiers' additional right of entry is not dependent upon consummation of the original entry.

The widow of an honorably discharged soldier, who made homestead entry in her own right as the head of a family, for less than one hundred and sixty acres of land, is, under section 2 of the act of June 8, 1872, as amended by the act of March 3, 1875, entitled to make an additional entry of so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres.

Acting Secretary Ryan to the Commissioner of the General Land
(W. V. D.) *Office, June 4, 1902.* (J. R. W.)

The Sierra Lumber Company, transferee of Augusta Romanoski, appealed from your office decision of March 25, 1902, denying reinstatement of the soldier's additional homestead entry of Augusta Romanoski, for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 27, T. 27 N., R. 6 E., M. D. M., Susanville, California.

Frederick W. Romanoski was enrolled as a soldier in Company I, 10th Regiment of Cavalry, Missouri Volunteers, September 12, 1862, and was discharged, September 19, 1865, upon the muster out of Company H, 2d Mo. Cav. Vol., to which he had been transferred, and died in Crawford county, Missouri, March 11, 1869. July 10, 1869, Augusta Romanoski, in her own name, as the head of a family, at Boonville, Missouri, made homestead entry for the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 27, T. 40 N., R. 4 W., which was canceled, July 10, 1880, for abandonment.

October 1, 1875, at Susanville, California, she made soldier's additional homestead entry, as widow of Frederick Romanoski, for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 27, T. 27 N., R. 6 E., M. D. M., which was canceled by your office September 28, 1885, because the basis entry above mentioned had been previously canceled for abandonment. March 15, 1900, after an interval of about fourteen and a half years, as assignee of Augusta Romanoski, the movant made application for reinstatement of the additional entry so canceled. Your office decision of December 20, 1901, held that—

The right to an additional homestead under section 2306, R. S., is predicated upon a previous entry by the soldier for less than one hundred and sixty acres, and said soldier having failed to exercise said right during his lifetime, his widow by the provisions of Sec. 2307, R. S., did not become, as such widow, entitled to an additional homestead right under existing homestead laws, as the right had not become vested in him at the time of his decease.

It is apparent that Augusta Romanoski, at the time of making such entry No. 1045, did not have any additional homestead right, that said entry was invalid and should never have been allowed by the local officers.

Said application is therefore rejected.

January 17, 1902, the Sierra Lumber Company filed its motion for review and reconsideration of said decision, and March 25, 1902, your office decision held—

that until the soldier dies the benefits conferred by section 2307 can not accrue; that upon his death, his widow, if unmarried, may exercise whatever right the soldier had; that if the soldier had not previous to his death made an entry under the homestead laws, he did not have an additional right, and she became entitled to enter and perfect title to 160 acres under sections 2304 and 2307, R. S., receiving the benefits from his military service to which he was entitled. She did not, however, become entitled to an additional entry under section 2306, a prior entry, by the sol-

dier, for less than 160 acres, being a conditional precedent to the benefits conferred thereby. See case of William Deary (31 L. D., 19), and departmental decision March 5, 1902, in case of Coffin, assignee of Gaffield.

Said motion is therefore denied.

The ground assigned for cancellation of the additional entry was erroneous. It is not essential to the additional right that the original entry should have been consummated. Instructions, 24 L. D., 502, 504; Ricard L. Powel, 28 L. D., 216. The fact that Mrs. Romanoski abandoned her original entry was, therefore, no ground for cancellation of the additional entry.

Nor, in view of the Department, upon a proper construction of the act of June 8, 1872 (17 Stat., 333), was the ground assigned in your office decision of December 20, 1901, a proper reason to refuse reinstatement of the entry.

The act of June 8, 1872, *supra*, gave to honorably discharged soldiers and sailors, and in case of their death to their widows and orphan children, the right to enter one hundred and sixty acres of land, irrespective of its classification as double minimum land. By the general homestead act the homestead right was restricted to eighty acres, or a half quarter section, of double minimum land. The act of June 8, 1872, granted an increased and more valuable right to the classes of persons therein named. The widow and orphan children of a deceased soldier or sailor were expressly named by the first section to be beneficiaries under it. Section 2 as amended March 3, 1873 (17 Stat., 605), then provides:

That any person entitled under the provisions of the foregoing sections to enter a homestead, who may have heretofore entered under the homestead laws a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres.

Under this section, if Augusta Romanoski was the widow of an honorably discharged soldier or sailor and unmarried, she was by its express terms "entitled to all the benefits enumerated in this act," as belonging to one of the classes of persons to whom the right was granted. Had she taken no original homestead prior to the act of June 8, 1872, she might have entered in her own right a full quarter section of double minimum land, while under the general homestead act she could take only a half quarter section. Before passage of the act she had exercised her right under the general law and was by section 2 entitled to an additional entry, as she would be entitled to an original entry of one hundred and sixty acres under the provisions of section 1, except for the fact that she had previously made entry for a half quarter section only. Having made such entry, she was entitled under the act to an additional entry.

This construction of the act is not inconsistent with departmental decision in William Deary (31 L. D., 19), as in that case no entry had been made by Samuel Meadow. He wandered away insane, and his wife, Mary A. Meadow, in his lifetime, in her own right as a deserted wife, and head of the family, made the entry upon which the additional right was claimed. Her husband had never exercised his right of homestead, and, had he recovered his reason, might have claimed the full benefits of the homestead act, notwithstanding her entry.

Your office decision of March 25, 1902, in so far as it holds that no additional right arises under the act of June 8, 1872, to the widow unless an original entry was made by the soldier or sailor himself, is erroneous, and is reversed.

It is not, however, clear upon the present state of the record that the additional entry in question should be reinstated. The movant appears to have allowed the erroneous cancellation of the entry to stand unquestioned from September 28, 1885, until March 13, 1900, and other rights may have in good faith intervened superior in equity to the movant's right. The movant should be required to make a showing that no adverse claim exists, or that the adverse claimant, if there be one, has been notified and given opportunity to be heard.

The case is remanded to your office for further proceedings in accordance with this opinion.

HUTTON ET AL. *v.* FORBES.

Motion for review of departmental decision of May 3, 1902, 31 L. D., 325, denied by Acting Secretary Ryan, June 7, 1902.

LIEU SELECTION UNDER THE ACT OF JUNE 4, 1897.

PORTER *v.* LANDRUM.

An entry or selection of public lands which is not so far perfected as to confer an equitable title or vested right, does not take the land included therein out of the operation of the mining laws; but, ordinarily, where an entry or selection of public lands is received and recognized by the local officers, it will, while pending, prevent the receipt or recognition of other applications for the same land, until such entry or selection is disposed of.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) June 9, 1902. (G. F. P.)

April 23, 1900, Henry M. Porter filed selection, under the act of June 4, 1897 (30 Stat., 11, 36), for the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 26, the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, and NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 27, T. 6 N., R. 54 W., and the SE.

$\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 18, and NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 8, T. 6 N., R. 53 W., Sterling, Colorado, land district, in lieu of an equal quantity of land in a public forest reservation.

The selection was accompanied by a duly recorded deed from the selector, purporting to relinquish and reconvey to the United States the base lands, an abstract of title, and an affidavit stating that the selected lands were non-mineral; but there was no proof that they were unoccupied. This imperfect selection, instead of being rejected at the time of its presentation, as it should have been, was erroneously received by the local officers and regularly forwarded to your office for consideration and action. It appears, however, that before said selection was acted upon by your office, to wit, on August 20, 1900, the local officers permitted one Thomas J. Landrum to make homestead entry for the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 27, a portion of the land included in this selection. The selection was not acted upon by your office until May 16, 1901, when the absence of the required proof, showing the lands selected to be vacant, was noted, and also the conflict with Landrum's homestead entry, and, by your office decision rendered on that day, the selection was rejected for the reason that the failure to furnish non-occupancy proof could not be cured on account of the intervening homestead entry; from which decision the selector has appealed to this Department.

Were the matter one solely between the government and the selector, the selection might be completed by the submission of the requisite proofs showing the lands to be of the character and condition subject to selection, the rights of the selector to be determined as of the date of the completion of the selection. *Kern Oil Co. v. Clarke* (30 L.D., 550); *Gray Eagle Oil Co. v. Clarke* (30 L.D., 570); *Gary B. Peavey* (31 L. D., 186); *Charles H. Cobb* (31 L.D., 220).

Any entry or selection of public lands which is not so far perfected as to confer an equitable title or vested right, does not take the land included in such entry or selection out of the operation of the mining laws, but, ordinarily, where an entry or selection of public lands is received and recognized by the local officers such entry or selection will prevent the receipt or recognition of other applications for the same land, until such entry or selection is disposed of; and good administration therefore required that, pending the disposition of the selection in question, even though erroneously received, no other application including any portion of the lands embraced in said pending selection should have been accepted, and no rights will be accorded any subsequent applicant based merely upon the erroneous action of the local officers in accepting his application.

The selector will, therefore, be allowed a reasonable time within which to complete his selection, by filing the requisite proofs, if he can do so, concurring in point of time, showing the lands selected to

be both non-mineral in character and unoccupied. If Landrum, misled by the erroneous action of the local officers, has settled upon the land covered by his homestead entry, he will be fully protected in his settlement, as the selector will be unable to make the required proof as to non-occupancy of the tract so settled upon.

Your office decision is accordingly modified, and the record in the case is herewith returned to be disposed of in accordance with the views herein expressed.

REPAYMENT—DESERT-LAND ENTRY—COMPACTNESS.

JULIA B. KEELER.

The right to repayment of the purchase money paid on a desert-land entry will be recognized where the entry as allowed is in form *prima facie* non-compact, and it does not appear from the record that it was as nearly in compact form "as the situation of the land and its relation to other lands will admit of," and was for that reason erroneously allowed and could not have been confirmed.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) June 16, 1902. (C. J. G.)

Julia B. Keeler, widow and heir of Julius M. Keeler, deceased, appeals from the decisions of your office of March 8, 1901, and May 6, 1902, denying her application for repayment of the purchase money paid by said Julius M. Keeler on entry made under the desert-land act of March 3, 1877 (19 Stat., 377), for fractional E. $\frac{1}{2}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$, Sec. 31, W. $\frac{1}{2}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 32, T. 16 S., R. 38 E., fractional W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 4, and fractional NE. $\frac{1}{4}$, Sec. 5, T. 17 S., R. 38 E., Bodie, California, land district.

The entry was made March 15, 1880, and canceled upon relinquishment March 31, 1884. Repayment is claimed under section 2 of the act of June 16, 1880 (21 Stat., 287), on the ground that "the entry was erroneously allowed and could not be confirmed" because the land embraced therein was not in compact form.

The basis of your said office decision is as follows:

Reference to the plat of survey of the tract embraced in Keeler's entry reveals the fact that it is bounded on the south and west by Owens Lake, and on the north and east by mountains, and that it was impracticable to readjust the boundaries of the entry in any way so as to bring it more completely within the rule of compactness as approved by this office without violating the statutory right of the entryman by requiring him to surrender a portion of the tract for want of compactness.

The Wheeler case (30 L. D., 355) clearly expresses the rule intended to govern in such matters where the facts are essentially the same. In that case your office had reported, among other things, that the entry therein was not in compact form as made and that the records of your office failed to disclose any reason for the allowance of the entry in

the form in which it was allowed. Accepting this report the Department held that the entry was not in compact form. The entry in question is equally as irregular in shape. It appears to have been the uniform practice of your office, certainly since the regulations of September 3, 1880 (2 C. L. L., 1378), and is the practice now, in cases where a desert-land entry was *prima facie* non-compact in form, to call upon the entryman to adjust the same so as to embrace a compact body of land, and in the event of his failure to do so, or to show cause why he should not be required to do so, to cancel the entry. No such call was made in this case, consequently no showing has been made by the entryman, or in his behalf.

The plats of survey show that the land in question is bounded on the south and west by Owens Lake. To that extent the statement contained in your office decision relative to the boundaries of said land is correct. But the statement that said land is bounded on the north and east by mountains, except possibly at the extreme southeastern portion, is not borne out by the plats of survey. On the contrary, the mountains to the north are a mile or more distant from the north line of the entry, leaving more than enough land before the mountains are reached to enable the entryman to adjust his entry in that direction without sacrificing quantity. The field notes show that the lands to the north and east of this entry, along the lines of survey, are of the same general character, "level" and "rolling," as that embraced in said entry. The adjacent and surrounding lands were vacant when this entry was made. The records of your office therefore are not at all conclusive that "it was impracticable to readjust the boundaries of the entry in any way so as to bring it more completely within the rule of compactness, etc." It was evidently the purpose of the entryman in this case to secure as much land on the shore line or water front of the lake as possible, and this must have been apparent to the local officers when they allowed the entry.

The requirement of compactness of form is statutory, and the regulations above referred to are in part as follows:

The requirement of compactness of form will be held to be complied with on surveyed lands when a section, or part thereof, is described by legal subdivisions compact with each other, as nearly in the form of a technical section as the situation of the land and its relation to other lands will admit of, although parts of two or more sections be taken to make up the quantity or equivalent of one section. But entries which show upon their face an absolute departure from all reasonable requirements of compactness, and being merely contiguous by the joining of ends to each other, will not be admitted, whether on surveyed or unsurveyed lands.

In no case will the side lines be permitted to exceed one mile and a quarter, when the full quantity of six hundred and forty acres is entered. Where the entry embraces a less quantity than a whole section, or its equivalent, the limit to the side lines will be proportionately decreased.

The only material modification made in these regulations was in the case of Francis M. Bishop (5 L. D., 429), wherein the last paragraph

above was eliminated, it being held that the residue of said regulations was ample for the protection of the government and for the proper administration of the law. These regulations apply to entries made before as well as after their promulgation. Joseph Shineberger (on review, 9 L. D., 379). Their necessary corollary is that where an entry by legal subdivisions is not in the form of a technical section, or *prima facie* non-compact, in order to stand at all it must appear that it is as nearly in such form "as the situation of the land and its relation to other lands will admit of." In the cases cited by your office the entries were allowed to stand though irregular in shape, because it was conclusively shown to be impossible for the entrymen to adjust their entries, without sacrificing a portion thereof, owing to the presence of adjacent or surrounding entries, precipitous mountains, or such elevation of the land as to render it non-irrigable. So far as the record here discloses there never has been any evidence of this character in the present case. It is too violent a presumption to assume that the local officers were in possession of such evidence when they allowed the entry, especially as it appears to have been the practice at the time to receive applications to enter like the present one without objection. As stated, the plats and field notes fail to disclose any valid reason why the entry might not have been made more nearly in the form of a technical section, nor is any reason otherwise shown. The irresistible conclusion therefore is that, upon the face of the entry which shows a gross departure from any reasonable requirement of compactness, the entry was in fact non-compact in form and therefore allowed in violation of the statutory requirement, which precluded its confirmation. This is deemed sufficient to bring the case within the terms of the repayment statute.

The decision of your office is reversed, and, if there be no other objection, repayment will be allowed as applied for.

HOMESTEAD—SOLDIERS' ADDITIONAL—DECLARATORY STATEMENT.

FRED W. ASHTON.

The filing of a soldier's declaratory statement is not the equivalent of an entry, within the meaning of section 2306 of the Revised Statutes, granting the right to make a soldier's additional homestead entry to persons "who may have *heretofore entered* under the homestead laws less than one hundred and sixty acres of land."

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) June 19, 1902. (D. C. H.)

Fred W. Ashton, as assignee of George Turbush, has appealed from the decision of your office, rendered April 12, 1902, rejecting his appli-

cation to enter, under section 2306 of the Revised Statutes, lot 5 of Sec. 2, T. 11 N., R. 8 W., Lincoln, Nebraska, land district, containing 8.80 acres.

The record shows that, April 25, 1874, Turbush filed a soldier's declaratory statement for lots 1 and 2 and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 18, T. 24 S., R. 6 W., Wichita, Kansas; that he made homestead entry of said land August 13, 1874, submitted final proof thereon May 7, 1881, and patent issued April 20, 1882.

The only question presented for consideration by the appeal is, whether or not, under a proper construction of the homestead laws, the filing of the declaratory statement is an entry and brings the case within the terms of section 2306 of the Revised Statutes, which limits the right of additional entry to persons "who may have heretofore entered under the homestead laws less than one hundred and sixty acres of land."

It will be noted that although the declaratory statement was filed April 25, 1874, the entry of the land was not made until August 13, 1874, subsequent to the date of the approval of the Revised Statutes (June 22, 1874).

Section 2304 of the Revised Statutes provides that a soldier homestead settler "shall be allowed six months after locating his homestead, and filing his declaratory statement, within which to make his entry and commence his settlement and improvement," and section 2309 provides that "such claimant under section 2304 in person shall within the time prescribed make his actual entry, commence settlements and improvements on the same, and thereafter fulfill all the requirements of the law." The aforesaid sections of the Revised Statutes plainly show that the filing of a soldier's declaratory statement is not an entry but simply the initiation of a right by which the land described in the statement is held for six months for the benefit of the declarant, and that to secure the right thus initiated entry, settlement, and improvement must follow the filing of the declaratory statement within six months. *Snyder v. Ellison* (5 L. D., 353); *Joseph M. Adair* (8 L. D., 200); *Wood v. Tyler* (22 L. D., 679).

As the statute (Sec. 2306, R. S.) limits the right of additional entry to persons "who may have heretofore entered under the homestead laws less than one hundred and sixty acres of land," and as it appears that the entry here in question was made after the date of the approval of the Revised Statutes, it follows that this case does not come within the terms of the aforesaid section of said statutes, and that the action of your office in rejecting Ashton's application was right and proper.

Your office decision is accordingly affirmed.

COMMUTATION OF AND SECOND HOMESTEAD ENTRIES—ACT OF MAY 22, 1902.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

*Washington, D. C., June 19, 1902.**Registers and Receivers, United States Land Offices.*

GENTLEMEN: Your attention is called to the provisions of section 2 of the act of Congress of May 22, 1902 (Public—No. 122), entitled, "An act to allow the commutation of and second homestead entries in certain cases," which reads as follows:

That any person who, prior to the passage of an act entitled "An act providing for free homesteads on the public lands for actual and *bona fide* settlers, and reserving the public lands for that purpose," approved May seventeenth, nineteen hundred, having made a homestead entry and perfected the same and acquired title to the land by final entry by having paid the price provided in the law opening the land to settlement, and who would have been entitled to the provisions of the act before cited had final entry not been made prior to the passage of said act, may make another homestead entry of not exceeding one hundred and sixty acres of any of the public lands in any State or Territory subject to homestead entry: *Provided*, That any person desiring to make another entry under this act will be required to make affidavit, to be transmitted with the other filing papers now required by law, giving the description of the tract formerly entered, date and number of entry, and name of the land office where made, or other sufficient data to admit of readily identifying it on the official records: *And provided further*, That said person has all the other proper qualifications of a homestead entryman: *And provided also*, That commutation under section twenty-three hundred and one of the Revised Statutes or any amendment thereto, or any similar statute, shall not be permitted of an entry made under this act, excepting where the final proof, submitted on the former entry hereinbefore described, shows a residence upon the land covered thereby for the full period of five years or such term of residence thereon as added to any properly credited military or naval service shall equal such period of five years.

Under said section any person may make another homestead entry who, prior to the passage of said act of May 17, 1900 (31 Stat., 179), made a homestead entry for lands in the ceded Indian reservations affected by said act of 1900, *supra*, and perfected the same and acquired title to the land by final entry under section 2291, U. S. R. S., or by commutation under section 2301, U. S. R. S., or any amendment thereto, or any similar statute, by having paid the price provided in the law opening the land to settlement.

You will require each applicant for another entry hereunder to furnish sufficient data whereby his former entry may be identified, and show that he has all the other qualifications of a homestead entryman.

It will be observed that an entry made hereunder can not be perfected by commutation under section 2301, R. S., or any amendment thereto, or any similar statute, excepting where the final proof, submitted on the former entry "hereinbefore described," show a resi-

dence upon the land covered thereby for the full period of five years, or such term of residence thereon as added to any properly credited military or naval service shall equal such period of five years.

Very respectfully,

BINGER HERMANN, *Commissioner*.

Approved, June 19, 1902,

E. A. HITCHCOCK, *Secretary*.

MINING CLAIM—LODE APPLICATION—INTERSECTING MILLSITE.

PAUL JONES LODE.

An application for patent to a lode mining claim may embrace ground lying on opposite sides of an intersecting patented millsite, provided the lode or vein upon which the location is based has been discovered in both parts of the lode claim. Departmental decision herein of February 10, 1899, 28 L. D., 120, modified.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *June 19, 1902.* (A. B. P.)

This is a motion for review of the decision of the Department, dated February 10, 1899 (28 L. D., 120), in the matter of mineral entry, No. 28, made by the Combination Mining and Milling Company, for the Paul Jones lode mining claim, Missoula, Montana, land district.

The published decision contains a diagram showing the relative positions of said lode claim and the Gladstone mill site, the latter dividing the former into two parts, the smaller or northerly part containing the discovery tunnel and all other improvements. The lode claim was located January 19, 1891, and application for patent thereto filed June 1, 1893. The mill-site claim was located September 17, 1886, application for patent thereto, embracing also the Gladstone lode claim, was filed August 29, 1887, entry was made December 29, 1887, and patent was issued thereon December 2, 1892. In view of these facts, and the patent as to the mill site being for non-mineral land, your office held that the entry for the Paul Jones lode claim could only stand for one or the other of the two parts of the claim, giving the claimant, however, the privilege of retaining the larger or southerly part, provided it should show "a discovery of mineral thereon, and that \$500 have been expended in labor or improvements upon that part of the claim." Upon appeal, such holding was affirmed by the Department in its said decision; and at the same time there was declined therein the proposed surrender to the United States of the title to the ground in conflict between the said mill site and the Paul Jones lode claim, with a view to embracing such ground in a patent to be issued for the lode claim, said company claiming to have acquired the title to such ground and alleging that the same was known to be mineral land at the date of application for patent to the mill site.

It is now urged that under the decisions of the Department in the cases of The Hidee Gold Mining Company (30 L. D., 420) and The Alice Lode Mining claim (*Id.*, 481), the entry of the Paul Jones claim should be allowed to stand as to both the said parts thereof, that is, the parts lying on each side of the said patented mill site. In the Alice case, the decision in which is based upon that in the Hidee case, the Department held (syllabus):

The location lines of a lode mining claim may be laid within, upon or across the surface of patented agricultural land for the purpose of claiming the free and unappropriated ground within such lines and the veins apexing in such ground, and of defining and securing extralateral underground rights upon all such veins, where such lines (*a*) are established openly and peaceably and (*b*) do not embrace any larger area of surface, claimed and unclaimed, than the law permits.

The precise question presented in the case at bar was not presented in the Alice or Hidee cases. If it were shown that the same lode or vein, upon the discovery of which on the northerly side of the said mill site the Paul Jones location was based, has also been discovered, in ground embraced in such location, on the southerly side of the mill site, the patented mill site would be no valid objection, in view of the Alice case, to the Paul Jones location, or to the entry embracing the parts thereof on each side of the mill site, even though such location had not been made until after the patenting of the mill site. But no lode or vein is shown to exist in the ground embraced in the Paul Jones claim on the southerly side of the mill site, and it cannot be presumed merely from the discovery of a vein on the northerly side of said mill site, in view of the fact that the mill site was patented as non-mineral ground, that the vein so discovered passes through the mill site and extends into the ground on the southerly side thereof.

In order that the Paul Jones entry may lawfully embrace the ground on the southerly side of the mill site, due proof of the discovery of the located vein or lode in such ground must be furnished. You will allow claimant a reasonable time within which to furnish such proof. Should the same be so furnished, you will pass the entry to patent, if there be no other objections thereto; but if the proof be not so furnished, you will cancel the entry as to the ground last mentioned. The previous decision of the Department herein is modified accordingly.

RIGHT OF WAY—REVOCATION—ACT OF MAY 14, 1896.

MOUNTAIN POWER CO. *v.* NEWMAN.

The approval of an application for a right of way and necessary ground upon public land, under the act of May 14, 1896, for the purpose of generating, manufacturing, or distributing electric power, does not amount to a reservation or appropriation of the land embraced in the application, so as to take it out of the operation of the public land laws; and the claimant under such approved application is in no position to object to the disposal of the lands by the government.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *June 20, 1902.* (F. W. C.)

With your office letter of May 29, last, was forwarded an appeal by the Mountain Power Company from your office decision of February 20, last, dismissing its protest against the issuance of patent upon Valentine scrip, 202 E, located by G. O. Newman, October 9, last, on unsurveyed land in Sec. 4, T. 1 S., R. 2 W., S. B. M., Los Angeles, California. The plat of survey of the E. $\frac{1}{2}$ of Sec. 4, was filed in the local land office November 12, last, and on January 22, following, said location was adjusted to the lines of the public survey conforming said location to the NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of said Sec. 4.

November 8, last, the Mountain Power Company filed its protest against the issuance of patent upon said scrip location, the ground of the protest being that said company had succeeded to the right granted to A. G. Hubbard September 21, 1897, under the provisions of the act of May 14, 1896 (29 Stat., 120), to use 20 acres in the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said Sec. 4, for a power house site, and a right of way over the said E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ for conveying water from the Santa Anna river, the right of use being desired for the purpose of erecting, maintaining and operating the necessary canals, hydraulic works and power house for the generation of electricity and that said 20 acres lies wholly or in part within the tract located by Newman.

In disposing of said protest your office decision calls attention to the fact that in the departmental approval of Hubbard's application granting his permission for the use of the right of way under the act of 1896, special reference was made to paragraph 6 of the circular of December 23, 1896 (23 L. D., 519) issued under said act, which paragraph provides:

That the disposal by the United States of any tract crossed by the permitted right of way is of itself, without further act upon the part of the Department, a revocation of the permission, so far as it affects that tract.

The permission given to Hubbard under the act of May 14, 1896, did not amount to a reservation or appropriation of the lands included in his application, so as to take them out of the operation of the public land laws. Further, it does not appear that said company is in the actual use of the lands embraced in Hubbard's application, which was approved more than four years ago, it being merely alleged that "this protestant, in good faith, intends, and expects to utilize the said rights for the purpose for which they were granted." Neither Hubbard, nor any one claiming under or through him, would therefore seem to be in a position to object to the disposal of the lands embraced in said application. Your action dismissing the protest in question must be affirmed.

OKLAHOMA—TERRITORIAL SELECTIONS.

JOHN W. SPAIN.

Under the provision in the act of June 6, 1900, that in case any section 13 or 33, reserved by said act to the Territory and future State of Oklahoma for university and other purposes, was "lost to said Territory by reason of allotment under this act or otherwise," other lands equal to the loss might be located, said Territory is authorized to select lands in lieu of any such section 13 or 33 lost to said reservation by reason of its inclusion within a pasture reserve set aside by the Secretary of the Interior pursuant to article three of a treaty between the United States and the Comanche, Kiowa and Apache Indians, concluded October 6, 1892.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *June 27, 1902.* (G. B. G.)

The land here involved is the NE. $\frac{1}{4}$ of Sec. 34, T. 7 N., R. 18 W., El Reno land district, Oklahoma, and the case arises upon the application of John W. Spain to make homestead entry therefor, presented at the local office October 21, 1901.

The local officers rejected the application because of the prior indemnity selection of said tract by the Territory of Oklahoma, and upon Spain's appeal that action was affirmed by your office. The further appeal of Spain brings the case here.

This tract was selected or located by the governor of the Territory per list No. 2, on the blank day of June, 1901, in lieu of Sec. 33, T. 2 S., R. 14 W., alleged to have been lost to the reservation made by the act of June 6, 1900 (31 Stat., 672, 679-680), for university, agricultural colleges, normal schools and public buildings in the Territory and future State of Oklahoma, by reason of its inclusion within a pasture reserve set aside by the Secretary of the Interior pursuant to article 3 of a treaty between the United States and the Comanche, Kiowa and Apache Indians, concluded October 6, 1892.

The treaty referred to ceded to the United States the title and claim of said Indians to certain described lands occupied by them in the Indian Territory, subject to the allotment of land in severalty as therein provided, "and subject to the setting apart as grazing lands for said Indians 480,000 acres of land." By article 3 of the treaty it was stipulated—

That in addition to the allotment of lands to said Indians as provided for in this agreement, the Secretary of the Interior shall set aside for the use in common for said Indian tribes four hundred and eighty thousand acres of grazing lands, to be selected by the Secretary of the Interior, either in one or more tracts, as will best subserve the interest of said Indians.

The act of June 6, 1900, *supra*, confirming this treaty, provided for the opening of the land to settlement by proclamation of the President within six months after the making of the allotments; with certain

provisos not here material. A further provision of said act is as follows:

That sections sixteen and thirty-six, thirteen and thirty-three of the lands hereby acquired in each township shall not be subject to entry, but shall be reserved, sections sixteen and thirty-six for the use of the common schools, and sections thirteen and thirty-three for university, agricultural colleges, normal schools, and public buildings of the Territory and future State of Oklahoma; and in case either of said sections, or parts thereof, is lost to said Territory by reason of allotment under this act or otherwise, the governor thereof is hereby authorized to locate other lands not occupied in quantity equal to the loss.

Pursuant to said treaty stipulation pasture reserves were set apart for said Indians April 22, 1901, one of which included the said Sec. 33, after which the said lieu selection of the land in controversy was made, which selection was approved by the Secretary of the Interior July 6, 1901.

The President's proclamation opening these lands to entry is dated July 4, 1901, and is in part as follows:

Now, therefore, I, William McKinley, President of the United States of America, by virtue of the power vested in me by law, do hereby declare and make known that all of the lands so as aforesaid ceded by the Wichita and affiliated bands of Indians, and the Comanche, Kiowa, and Apache tribes of Indians, respectively, saving and excepting sections sixteen, thirty-six, thirteen, and thirty-three in each township, and all lands located or selected by the Territory of Oklahoma as indemnity school or educational lands, and saving and excepting all lands allotted in severalty to individual Indians, and saving and excepting all lands allotted and confirmed to religious societies and other organizations, and saving and excepting the lands selected and set aside as grazing lands for the use in common for said Comanche, Kiowa, and Apache tribes of Indians, and saving and excepting the lands set aside and reserved at each of said county seats for disposition as town sites, and saving and excepting the lands now used, occupied, or set apart for military, agency, school, school farm, religious, Indian cemetery, wood reserve, forest reserve, *or other public uses*, will, on the 6th day of August, 1901, at 9 o'clock, a. m., in the manner herein prescribed and not otherwise, be opened to entry and settlement and to disposition under the general provisions of the homestead and townsite laws of the United States.

The substance of appellant's contention is that said lieu selection by the Territory was invalid (1) because prior to the inclusion of the base land in the pasture reserve it had been reserved to the Territory by said act of June 6, 1900, and that therefore its inclusion in the pasture reserve was unauthorized; (2) because even if it be admitted that its inclusion in the pasture reserve was an authorized executive act the land was not thereby lost to the Territory within the meaning of said act.

It is believed that this case might rest upon the fact made reasonably plain by a study of said treaty, act and proclamation, that whatever may be true as to the validity of said selection the land in controversy was not at the date of the presentation of Spain's application, and is not now, subject to homestead entry. It is not stated for what specific purpose this land was selected by the Territory except that it was to satisfy the loss of a section 33, and by reference to the

act of June 6, 1900, it is found that this section 33 was of the class of lands included in the reservation thereby made for university, agricultural colleges, normal schools and public buildings. The land in controversy was therefore "located or selected by the Territory of Oklahoma as . . . educational lands" within the meaning of one of the excepting clauses in the President's proclamation opening these lands, has never been opened to entry but was specifically excepted therefrom, and for this reason alone was not subject to Spain's application.

But aside from this no argument is made which casts doubt upon the legality of the action then taken. The intention of the parties as expressed in the treaty undoubtedly was that the said 480,000 acres should be set apart in a large body or large bodies of land, and Congress in dealing with the situation was of necessity impressed with the idea that it would not be to the best interest of either the Indians or the Territory to permit within these boundaries land for the use of the Territory. It was therefore provided that in case any section 13 or 33 was "lost to said Territory by reason of allotment under this act *or otherwise*," other lands equal to the loss might be located. These Indian pastures are of indefinite duration. The Indian right of occupancy may never be extinguished. Their setting apart was one of the considerations which induced the Indian cession. While it might result that sections 13 and 33 would not be ultimately lost to a future grant, they are undoubtedly lost to the reservation created by said act by reason of their authorized inclusion in the pasture reserve. To say that Congress did not contemplate the setting aside for the use of the Indians any of the sections named, is to argue that it was intended that these sections should be excepted, and cut out of the boundaries to be included in the pasture reserves, a result which would be attended with so many embarrassing complications for both the territorial authorities and the Indians as to preclude such a conclusion. Every question raised by this appeal was of necessity considered by this Department in the approval of said list, and the action then taken rests upon conclusions fatal to appellant's contentions.

The decision of your office is affirmed.

RIGHT OF WAY—RESERVOIR—SECTION 19, ACT OF MARCH 3, 1891.

HOMER E. BRAYTON.

The approval of a map of right of way for a canal, ditch, or reservoir, under the nineteenth section of the act of March 3, 1891, does not vest in the applicant the title to the land covered by such right, and the land may thereafter be disposed of by the government subject to such right of way.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *July 2, 1902.* (A. S. T.)

On February 4, 1901, Homer E. Brayton, as assignee of John T. Pistole, applied to make soldier's additional homestead entry for the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 20, T. 28 S., R. 61 W., 6th P. M., Pueblo land district, Colorado.

On April 18, 1902, your office rejected said application on the ground that the tract applied for is embraced in the selection of the Rocky Ford Canal Reservation Land and Loan Trust Company, under the act of March 3, 1891 (26 Stat., 1095), the map of location having been filed February 2, 1898, and approved August 10, 1899. The applicant has appealed to this Department.

The question presented for consideration is, whether or not the filing and approval of the map, as required by the 19th section of said act, has the effect to withdraw the land embraced therein from other disposition by the United States.

Said section provides that—

upon the approval thereof [of the map] by the Secretary of the Interior, the same shall be noted upon the plats in said office [the local office], and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such rights of way.

It is thus expressly provided by the statute that after the approval of the map the lands over which such right of way shall pass "*shall be disposed of* subject to such rights of way."

In departmental regulations concerning right of way for canals, ditches, and reservoirs over the public lands and reservations, approved June 27, 1900 (30 L. D., 325), it is provided that:

The act is not in the nature of a grant of lands; it does not convey an estate in fee in the right of way. It is a right of use only, the title still remaining in the United States. All persons settling on a tract of public land, to part of which right of way has attached for a canal, ditch, or reservoir, take the same subject to such right of way, and at the full area of the subdivision entered, there being no authority to make deduction in such cases.

The approval of the map did not have the effect to vest the title to the land in the company, but it still remains in the United States, the company having the right only to use the land, which may be disposed of subject to that right.

There appears, therefore, to be no reason why the applicant may not make entry for the land subject to the right of said company.

Your said decision is therefore reversed, and if there be no other objection, said entry will be allowed, subject to the right of said company to use the land for the purpose of a reservoir.

OKLAHOMA LANDS—COMMUTATION—SEC. 22, ACT OF MAY 2, 1890—
ACT OF MARCH 11, 1902.

MATTIE H. BEAL.

Judicial proceedings instituted to compel the Secretary of the Interior, by writ of mandamus, to allot certain lands to a member of the Comanche tribe of Indians, under the agreement ratified by the act of June 6, 1900, with said Indian tribe, the courts, so far as the matter has proceeded, having ruled against the petition for mandamus, will not prevent the commutation of a homestead entry for townsite purposes, under section 22 of the act of May 2, 1890, and the act of March 11, 1902, of the land involved.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *July 8, 1902.* (W. C. P.)

Mattie H. Beal, having applied to commute for townsite purposes, under section 22, act of May 2, 1890 (26 Stat., 81, 91), and act of March 11, 1902 (Public—No. 37), her homestead entry made August 6, 1901, for the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, and lot 4, Sec. 31, T. 2 N., R. 11 W., I. M., Lawton, Oklahoma, land district, the matter has been submitted for my consideration by your office letter of the 23rd ultimo, recommending the approval of the proofs and plat if the present status of judicial proceedings affecting part of this land do not suspend or prevent such action.

This land is a part of the Comanche, Kiowa and Apache lands which were opened to settlement and entry August 6, 1901, in the manner prescribed in the President's proclamation of July 4, 1901 (31 L. D., 1).

August 5, 1901, one Emmett Cox, claiming to be a member of the Comanche tribe and entitled to an allotment of three hundred and twenty acres of land under article six of the treaty with said Indians of August 28, 1868 (15 Stat., 581), and to one of one hundred and sixty acres under the agreement ratified by act of June 6, 1900 (31 Stat., 672, 676), filed his petition in the supreme court of the District of Columbia, praying for a writ of mandamus commanding the Secretary of the Interior to approve selections made by him in satisfaction of his said claimed rights, and to allot him the lands thus designated. The SE. $\frac{1}{4}$, Sec. 31, T. 2 N., R. 11 W., I. M., is the one-hundred-and-sixty-acre tract applied for by Cox under the agreement ratified by act of June 6, 1900.

August 6, 1901, Acting Secretary Ryan sent the local land officers at Lawton a telegram as follows:

You are advised that Emmett Cox has instituted judicial proceedings in the District of Columbia to secure an order of court directing the Secretary of the Interior to allot to him the southeast quarter, section twenty-five, township two north, range twelve west, or the southeast quarter, section thirty-one, township two north, range eleven west; and directed to inform any person applying to enter said lands of the pending litigation, and note the fact on the papers and record that entry thereof is allowed subject to such suit.

Cox's petition was denied by the supreme court of the District of Columbia in a decision rendered August 27, 1901. Upon appeal to the court of appeals of the District of Columbia, that decision was affirmed March 4, 1902. From this decision an appeal was asked by the petitioner to the supreme court of the United States, but it has not been perfected.

August 28, 1901, the Department wrote the Commissioner of the General Land Office as follows:

A decision was rendered August 27, 1901, by Justice Barnard of the supreme court of the District of Columbia, in the cases of Willis C. West and others, involving lands in the Lawton land district, and of Emmett Cox, involving lands in the Lawton land district. By this decision the petitions asking that the Secretary of the Interior be commanded by mandamus to approve the applications of the several petitioners for allotments as members of the Wichita and affiliated bands and of the Kiowa, Comanche and Apache tribes, respectively, were denied. From that decision the petitioners have prayed an appeal. This appeal will not, however, operate as a supersedeas. You will advise the local officers of the status of these proceedings and direct them to inform all homestead applicants for the lands involved, which lands were described in departmental telegrams of the 6th inst. to the respective officers, of that status.

Prior to the issuance of the President's proclamation of July 4, 1901, and prior to the commencement of this litigation, the Secretary of the Interior had held that Cox had not taken or acquired a three-hundred-and-twenty-acre allotment under article six of the treaty of 1868, and therefore was not entitled to receive such an allotment under article eight of the agreement ratified June 6, 1900, and also at the same time held that he had theretofore under said agreement selected and received another allotment of one hundred and sixty acres and was not entitled to change it to the said SE. $\frac{1}{4}$ of section 31.

This litigation does not constitute a bar in law to the allowance of a commutation of the entry in question. That entry was originally made with notice of Cox's claim, and if under these circumstances the entryman is willing to assume any risk incident thereto and insists on being allowed to make final entry, no impropriety is involved in permitting it to be done. The entryman was not a party to the mandamus proceeding, nor does that proceeding constitute an appropriate method of determining controverted or conflicting claims to public or Indian lands. *Brown v. Hitchcock* (173 U. S., 473, 478). When this Department shall, in due course of administration, have determined these conflicting claims and have issued a patent to the successful claimant, then any further controversy will be an appropriate subject of judicial cognizance and "the litigation will proceed, as it generally ought to proceed, in the locality where the property is situate, and not here, where the administrative functions of the government are carried on."

Nothing has occurred or been presented since the departmental

decision adverse to Cox which has changed or tended to change the opinion of the Department; and the mandamus proceeding, which has been held by two courts to be not well taken, does not furnish any sufficient reason for postponing the homestead entryman in obtaining a completion of the entry in a lawful manner. Instead of Cox being thereby deprived of a forum, the way will be opened for him, if he so desires, to go into the courts of the locality in a proceeding directed against an adverse claimant and not against a government officer, and in which the court can fully correct any mistake of law which could be corrected or prevented by the mandamus proceedings.

There is no pending contest against Beal's entry, nor is there any protest against the proposed commutation thereof. The proofs and plat have been examined, and are found, as stated by you, to be correct in form and sufficient in substance. The proof has therefore been accepted and the plat approved.

CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

INSTRUCTIONS.

An adverse report upon an entry, by a special agent of the government, filed within two years from the date of the final receipt issued upon such entry, is a "protest against the validity of such entry" within the meaning of the proviso to section 7 of the act of March 3, 1891, and the land department is warranted in making an investigation of such entry before passing it to patent.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *July 9, 1902.* (E. F. B.)

The Department is in receipt of your letter of April 9, 1902, requesting to be advised as to whether, under the facts set forth therein, the entry in a case now pending in your office is confirmed by the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095), which reads as follows:

That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry upon any tract of land under the homestead, timber culture, desert land or pre-emption laws, or under this act, and where there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry, before the issuing of a patent therefor.

The receiver's receipt upon the final entry in the case referred to was issued October 26, 1897. Said entry was suspended by your office, December 16, 1899, upon the report of a special agent, made October 16, 1899, and filed in your office October 23, 1899. It thus appears that while your office did not suspend the entry until after two years from the date of the issuance of the receiver's receipt upon final entry,

a report by a special agent against the validity of the entry has been filed in your office prior to the expiration of two years from the date of the final receipt.

In the instructions of May 8, 1891 (12 L. D., 450), the Department, in construing this provision of the act of March 3, 1891, said:

Under the proviso to said section 7, after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the laws mentioned, when there are no proceedings initiated within that time by the government or individuals, the entryman shall be entitled to patent.

The words "contest" and "protest" as used in the act were held to refer to proceedings against an entry initiated by individuals; but it was said that:

Nothing herein contained shall be construed as to prevent the government from completing proceedings initiated by it within the two years after the issuance of the receiver's receipt.

In the instructions of July 1, 1891 (13 L. D., 1), given in response to a letter from your office asking to be advised with reference to two cases in which your office had canceled the entry in one case and suspended it in the other, the Department, referring to that part of the instructions of May 8, 1891, first above quoted, and after stating that the question is, "What action on the part of the government will amount to the initiation of such proceedings," said:

The word "proceedings," as used herein and in the circular of May 8, 1891 (12 L. D., 450), will be construed as including any action, order or judgment had or made in your office canceling an entry, holding it for cancellation, or which requires something more to be done by the entryman to duly complete and perfect his entry, and without which the entry would necessarily be canceled.

See *Bulman v. Meagher* (13 L. D., 94); *Jennie Routh*, (Ib., 332); *United States v. McTee et al.* (Ib., 419).

But it has never been held that the proceedings specially mentioned in the instructions of July 1, 1891, are the only proceedings that can be taken by the government to defeat the confirmation of an entry, except in the case of *United States v. Childs* (13 L. D., 553), in which it was held that an order of the Commissioner, made within two years from date of entry, directing a special agent to investigate it—

was not an "action, order, or judgment had or made in your office, canceling an entry, holding it for cancellation," nor did it "require anything more to be done by the entryman to complete his entry." The order to the special agent, and his report after investigation, in this case can not be held to be such an institution of proceedings within two years from the date of the final certification as will prevent the confirmation of the entry under the proviso to section seven of the act of March 3, 1891.

That decision follows literally the instructions of July 1, 1891, and rejects every mode of proceeding or action that does not come strictly within the proceedings or actions enumerated in the instructions, although in that case the action of your office was clearly within the spirit of the instructions.

In *Cappelli v. Walsh* (12 L. D., 334), referred to in your letter, it was held that while the government is always a party in interest, to the extent of requiring a compliance with the law in good faith, it is not a contestant or protestant in the sense in which those terms are used in the proviso to the seventh section of the act of March 3, 1891.

In *Paul v. Wiseman* (21 L. D., 12), it was said that the action of the Commissioner suspending an entry would not defeat confirmation, unless it affirmatively appears that the entryman had notice of the order, but in the letter of the Department of October 10, 1898 (27 L. D., 522), it was stated that while the facts in the case of *Paul v. Wiseman* warranted the conclusion therein reached, the decision announced a rule contrary to the instructions of July 1, 1891, and your office was advised "that the commencement of any proceedings against the entry would be sufficient to prevent the bar of the statute, whether notice is given within said time or not," citing the instructions of July 1, 1891, and *John Malone* (17 L. D., 362).

If the instructions of July 1, 1891, are to be construed as holding that no proceeding by the government against the validity of an entry will defeat confirmation under the proviso to section 7 of the act of March 3, 1891, unless it is initiated in the manner specified in the instructions, the effect would be to exclude from such proceedings every report against an entry made by the agent of the government, although such report is an actual protest against the validity of the entry, clearly comes within both the letter and spirit of the statute, and is made within two years after the issuance of the receiver's receipt.

The proviso to section 7 of the act of March 3, 1891, is a statute of limitation. It operates as a bar to any proceeding against the validity of an entry that is not commenced within two years from the date of the receiver's receipt upon the final entry. While statutes of limitation, like other statutes, must be so construed as to effectuate the intention of the legislature, "yet as they are acts which take away existing rights, they should always be construed with reasonable strictness, and for the benefit of the rights sought to be defeated thereby, so far as can be done consistently with their letter and spirit." *Wood on Limitations*, Sec. 6.

The purpose of the statute was to protect the entry against any adverse proceeding after the lapse of two years from the date of the receiver's receipt upon final entry, whether such proceeding was instituted and prosecuted through individual efforts or by the government directly through its appointed agents. It did not contemplate that the running of the statute might be suspended by the intervention of individual contests or protests, while the government would be debarred from defeating the confirmation of a fraudulent entry by similar proceedings instituted on its own motion within the time fixed by the

statute. To so construe the statute would be to restrict the operation of the land department in the exercise of that just supervision over the disposal of the public lands which is conferred upon it by the organic law. Hence there is no reason for restricting the meaning of the word "protest" as used in the act to proceedings by individuals.

The word "contest," as used in the public land system, has a well known meaning. It is technically applied to proceedings against entries instituted by persons seeking to acquire a preference right of entry under the act of May 14, 1880. The word "protest" has a broader signification, and is applied indiscriminately to every proceeding against an entry, whether initiated by an individual in defense of his own right or as a friend of the government, or whether it is initiated by the government through its trusted agent. It is evidently so used in the act, and is not restricted to individual action, either by the letter or spirit of the act.

If a mere protestant without personal interest in the result of his protest may, by bringing to the notice of the government the invalidity or illegality of an entry, suspend the running of the statute, and defeat the confirmation of an entry, such protest would be equally as effective if brought to the notice of the government by the report of its own agent.

The duty of a special agent is to investigate and report upon the condition of all entries of public lands in order that fraudulent entries may be detected and prevented. He is appointed for that special duty. Every report made by him adverse to an entry challenges its validity, and is an actual protest against its allowance. No proceeding against an entry of public lands comes more directly and strictly within the words of the statute, "protest against the validity of such entry," than the adverse report of a special agent. When such report is filed within two years from the date of the final receipt, it is a "pending protest" against the validity of such entry within the meaning of the statute, and your office will be warranted in investigating such entry before passing it to patent.

INSTRUCTIONS RELATIVE TO FOREST-RESERVE LIEU LANDS SELECTIONS.

Acts June 4, 1897 (30 Stat., 36), and June 6, 1900 (31 Stat., 614).

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 7, 1902.

Registers and Receivers, United States Land Offices.

GENTLEMEN: The act of Congress approved June 4, 1897 (30 Stat., 34, 36), provides among other things with respect to forest reserves established and to be established under section 24 of the act of March 3, 1891 (26 Stat., 1095)—

That in cases in which a tract covered by an unperfected *bona fide* claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the law respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

By a subsequent act, approved June 6, 1900 (31 Stat., 614), it is declared—

That all selections of land made in lieu of a tract covered by an unperfected *bona fide* claim, or by a patent, included within a public forest reservation, as provided in the act of June fourth, eighteen hundred and ninety-seven * * * shall be confined to vacant surveyed and nonmineral public lands which are subject to homestead entry not exceeding in area the tract covered by such claim or patent: *Provided*, That nothing herein contained shall be construed to affect the rights of those who, previous to October first, nineteen hundred, shall have delivered to the United States deeds for lands within forest reservations and make application for specific tracts of lands in lieu thereof.

This provision was reenacted March 3, 1901 (31 Stat., 1037).

GENERALLY.

1. Relinquishments under the above acts may include any tract within the limits of a forest reserve covered by an unperfected *bona fide* claim under any of the general land laws of the United States,

or to which the full legal title has passed out of the government and beyond the control of the land department by a patent or by that which is the full legal equivalent of a patent.

2. Mineral lands, whether covered by patent or not, can not be relinquished as bases for lieu selections under said acts.

3. Relinquishments made in pursuance of said acts must be executed, acknowledged, and recorded in the same manner as conveyances of real property are required to be executed, acknowledged, and recorded by the laws of the State or Territory in which the lands are situated.

4. Selections after October 1, 1900, are authorized to be made only of vacant, surveyed, nonmineral lands which are subject to homestead entry.

5. Selections filed prior to October 1, 1900, may embrace unsurveyed lands, but must, within thirty days from notice by the local officers of the filing in their office of the township plat of survey, be made to conform to such survey.

6. Selections of unsurveyed lands will not be passed to patent until after four months following the filing of said plat in the local office. This is to enable any person claiming an adverse right therein to regularly assert the same.

7. The land relinquished and the land selected must be, as near as practicable, equal in area.

8. In a selection made prior to the receipt by the local officers of the instructions of this office dated January 16, 1900, for less land than that relinquished, ninety days from notice is allowed the selector in which to make additional selection in full satisfaction of such relinquishment, or waive his right to do so, and in default thereof the relinquishment and the partial selection will be rejected. This is not a new rule, but rather a restatement of the existing practice.

9. The rule of approximation permitted in entries under the homestead and other public land laws may properly be applied to selections under the acts aforesaid. (See 31 L. D., 225.)

10. Should a selection be presented, based upon a relinquishment or reconveyance to the United States of lands which are not at the date of the filing of such selection within the limits of a forest reserve, the selection will be rejected, unless it appears that such lands were within the limits of such a reserve at the date of the recording on the proper records of such relinquishment or reconveyance.

11. Selections should be filed in the proper land office within a reasonable time after the relinquishment or reconveyance has been recorded in the manner indicated.

12. In all cases where the showing required in these instructions, both as to the title or claim to the land relinquished and as to the character and condition of the land selected, is not made by the

selector at the time of filing the selection, you will reject the selection and give due notice thereof to the parties interested, in which notice the reasons for your action must be stated. Appeal from such action may be taken under the rules as in other cases. At the expiration of the time allowed for appeal, you will forward the record with your report thereon.

13. If protest or objection shall be at any time filed against the selection, you will forward the same to this office for consideration in connection with the selection.

LAND COVERED BY PATENT OR PATENT CERTIFICATE.

14. Where the legal title to the relinquished land has passed out of the United States, there must be filed with each relinquishment a duly authenticated abstract of title showing that at the time the relinquishment was filed for record the legal title was in the party making the relinquishment and that the land was free from liability for taxes, pending suits, judgment liens, and from other encumbrance.

15. Where the legal title to the relinquished land has not passed out of the United States, but patent certificate therefor has issued and is outstanding, there must be filed with each relinquishment a duly authenticated abstract of title showing that at the time the relinquishment was filed for record the full equitable title was in the party making the relinquishment and that the land was free from liability for taxes, pending suits, judgment liens, and from other encumbrance.

16. A relinquishment by an individual of land the legal title to which has passed out of the United States, or for which patent certificate is outstanding, must show whether the person relinquishing is married or single; and if married, the wife or husband of such person, as the case may be, must join in the execution of the relinquishment in such manner as to effectually bar any right or estate of dower, curtesy, or homestead, or any other claim whatsoever to the land relinquished, or it must be fully shown that under the laws of the State or Territory in which the relinquished land is situated such wife or husband has no interest whatever, present or prospective, which makes her or his joinder in the relinquishment necessary.

17. Selections in lieu of lands covered by patent or patent certificate may embrace contiguous or noncontiguous tracts in the same land district.

18. All papers and proofs necessary to complete a selection must be filed at one and the same time, and until they are all presented, no right will vest under the selection.

19. A selection based upon land covered by a patent or by a patent certificate must be made by the owner of the land relinquished or by a duly authorized agent or attorney-in-fact; and when made by an agent or attorney-in-fact, proof of authority must be furnished.

20. No fees or commissions are required to be paid in any selection made in lieu of land covered by a patent or by a patent certificate.

21. The affidavit to support a selection based upon the relinquishment of land covered by a patent or by a patent certificate must be made by the selector, or by some credible person possessed of the requisite personal knowledge in the premises, and must be filed with and as a part of the selection. This affidavit must show that the selected land is nonmineral in character; that it contains no salt springs or deposits of salt in any form, sufficient to render it chiefly valuable therefor; and that it is not in any manner occupied adversely to the selector. (Form 4-061a.)

22. In making selections in lieu of relinquished lands covered by patent or patent certificate, Form 4-643, or its equivalent, should be used; and in every such selection the selector must show, to the satisfaction of the local officers, by affidavit or otherwise, in addition to the other proofs required, that the relinquished land does not constitute the basis for any other selection made by him, and also whether or not the selected land is situated within 6 miles of a mining claim.

23. Where the selection is within 6 miles of a mining claim or within a mineral township you will require the selector, within twenty days from the filing of his selection, to begin publication of notice thereof at his own expense in a newspaper to be designated by the register as of general circulation in the vicinity of the land and published nearest thereto. Such publication must cover a period of thirty days, during which time a similar notice of the selection must be posted in the local land office and upon each and every noncontiguous tract included in the selection.

24. The notice should describe the land selected and give the date of selection, and state that the purpose thereof is to allow all persons claiming the selected land under the mining laws, or desiring to show it to be mineral in character, an opportunity to file objection to such selection with the local officers for the land district in which the land is situate and to establish their interest therein or the mineral character thereof.

25. Proof of publication shall consist of an affidavit of the publisher, or of the foreman or other proper employee, of the newspaper in which the notice was published, with a copy of the published notice attached. Proof of posting upon the land, and that such notice remained posted during the entire period required, shall be made by the selector or some credible person having personal knowledge of the fact. The register shall certify to posting in his office. The first and last dates of such publication and posting shall, in all cases, be given.

26. Where, at the time of the filing of a selection in lieu of relinquished land covered by a patent or by a patent certificate, the showing required by these instructions is fully made by the selector, the

selection will be received by the register and receiver and proper notation thereof made upon their records. If publication of notice of the selection, as provided in paragraphs 23, 24, and 25 of these instructions, is not necessary, the selection, when so received and noted of record, will be forthwith forwarded to the Commissioner of the General Land Office for his action thereon. If publication shall be necessary under said paragraphs 23, 24, and 25, the selection will, after such publication is completed, be promptly forwarded to the Commissioner of the General Land Office for his action. The action of the Register and Receiver in receiving a selection and making notation of the same upon their records will not in itself operate to confer any right upon the selector such as to prevent the subsequent rejection of the selection, where it is found that the selection as made was defective in any essential particular and for that reason should have been rejected.

UNPERFECTED BONA FIDE CLAIMS NOT COVERED BY PATENT CERTIFICATE.

27. Where the land relinquished is covered by an unperfected *bona fide* claim, for which no certificate for patent is outstanding, there must be filed with the selection a certificate by the recorder of deeds or official custodian of the records of transfers of real estate in the proper county that no instrument purporting to convey or in any way encumber the title to the land, or any part thereof, is on file or of record in his office; or if any such instrument or instruments be on file or of record therein, the certificate must show the facts.

28. A selection in lieu of an unperfected claim not covered by patent certificate must in all respects conform to the law under which such unperfected claim is held, and will be subject to the payment of such fees and commissions as would be required under the statute to complete the unperfected claim in lieu of which the selection is made.

29. If the land relinquished is covered by an unperfected claim, such as a homestead or desert entry, to which certificate for patent has not issued, and the law under which the claim was initiated requires that land taken thereunder must be in one body, the same requirement must be observed in making the lieu selection.

30. A selection of land in lieu of an unperfected claim held under the settlement laws, if credit for residence on the unperfected claim be desired, must, in addition to other proofs, be accompanied by the affidavit of the selector, corroborated by two witnesses, showing when residence was established on the unperfected claim and the duration of such residence. In such a case, unless the selector has resided upon, cultivated, and improved the relinquished unperfected claim for the full period required by law to earn a patent thereto, he must establish and maintain a residence on the land selected, and cultivate and improve the same for the full period required by law to earn a patent, less the time spent upon the relinquished unperfected claim.

31. If the relinquished unperfected claim be not one held under the settlement laws, the affidavit as to residence required by the preceding paragraph need not be furnished; but in either case the selector must make affidavit that he has not sold, assigned, mortgaged, or contracted to sell, the land covered by the relinquished unperfected claim.

32. In case a settler on an unsurveyed tract within a forest reserve desires to make a change of settlement to land outside of the reserve and receive credit for previous residence on the relinquished claim, he must file his selection in the same manner as provided with respect to selections in lieu of other unperfected claims, accompanied by the affidavit as to residence required in such cases, and should describe his unsurveyed claim with sufficient accuracy to enable the local land officers to approximately determine its location.

33. In making selections in lieu of relinquished unperfected *bona fide* claims, not covered by patent certificate, Form 4-634, or its equivalent, should be used; and every such selection must also be supported by affidavit the same as required by paragraph 21 of these instructions (Form 4-061a). In such selection special notice of the selection by publication or otherwise will not be required.

34. Selections in lieu of relinquished unperfected *bona fide* claims not covered by patent certificate, where the essential requisites shall have been fully complied with by selectors at the time of filing their selections, will be received and noted of record in the same manner and upon the same conditions as provided in paragraph 26 of these instructions, and will be forthwith forwarded to the Commissioner of the General Land Office for his action thereon.

35. A strict observance of these instructions will be required.

All previous circulars or instructions in conflict herewith are hereby revoked.

Very respectfully,

BINGER HERMANN,
Commissioner.

Approved:

E. A. HITCHCOCK, *Secretary.*

4-643.

PERFECTED CLAIMS.

SELECTION IN LIEU OF LAND IN ——— FOREST RESERVE.

(Act June 4, 1897.)

To the Register and Receiver,
United States Land Office.

GENTLEMEN:

I am the owner of the ——— Meridian, containing ——— acres; that said land is situate and lying within the boundaries of the ——— Forest Reserve; that I desire to relinquish and reconvey said land unto the United States, and in lieu thereof to

select the ——— land district, State of ———, and containing ——— acres, under the provisions of the act of June 4, 1897 (30 Stat., 36).

In compliance with the regulations under said act I have made, executed, and caused to be recorded in the proper county and State, a deed of reconveyance to the United States of the tract first above described and situate within said ——— Forest Reserve, and in relation thereto have caused a proper abstract of title to be made and authenticated, both of which are herewith submitted.

There are also submitted certificates from the proper officers showing that the land relinquished, or surrendered, is free from encumbrance of any kind; also that all taxes thereon, to the present time, have been paid, and an affidavit showing the lands selected to be nonmineral in character and unoccupied. I therefore ask that a United States patent issue to me for the tract or tracts thus selected.

Dated, ———.

LAND OFFICE AT ———,
———, 190—.

I, ———, Register of the land office, do hereby certify that the land above selected, in lieu of the land herein relinquished to the United States, is free from conflict, and that there is no adverse filing, entry, or claim thereto.

———,
Register.

Selection approved by the Commissioner of the General Land Office, per letter "R" to Register and Receiver ———, 190—.

———, Div. "R."

Application.

No.—.

4—634.

HOMESTEAD.

(Act June 4, 1897.)

LAND OFFICE AT ———,
———, 190—.

I, ———, whose post-office address is ———, do hereby apply to enter, under section 2289, Revised Statutes of the United States, and the act of Congress approved June 4, 1897 (30 Stat., 36), the ——— of section ———, in township ———, of range ———, containing ——— acres, in lieu of the ——— of section ———, in township ———, of range ———, in the district of lands subject to sale at ———, containing ——— acres, which latter land is within the ——— Forest Reserve, and all right, title, and interest in or to same has been relinquished by me to the United States.

LAND OFFICE AT ———,
———, 190—.

I, ———, Register of the land office, do hereby certify that the above application is for ——— lands of the class which the applicant is legally entitled to enter under section 2289, Revised Statutes of the United States, and the act of Congress approved June 4, 1897 (30 Stat., 36), and that there is no prior valid adverse right to same. ¹ ———.

———,
Register.

¹ If land applied for is unsurveyed, insert "subject to any prior valid adverse right," and erase "and that there is no prior valid adverse right to same."

HOMESTEAD AFFIDAVIT.

U. S. LAND OFFICE AT _____,
_____, 190—.

I, _____, of _____, _____, having filed my application No. — for an entry under section 2289, Revised Statutes of the United States, and the act of Congress approved June 4, 1897 (30 Stat., 36), do solemnly swear that I am not the proprietor of more than one hundred and sixty acres of land in any State or Territory; that I am ¹ _____; that my said application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation, and that I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that I am not acting as agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that I do not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for myself, and that I have not, directly or indirectly, made, and will not make, any agreement or contract, in any way or manner, with any person or persons, corporation or syndicate whatsoever, by which the title which I might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except myself; and further, that since August 30, 1890, I have not entered under the land laws of the United States or filed upon a quantity of land, agricultural in character and not mineral, which, with the tracts now applied for, would make more than three hundred and twenty acres, except _____, and that I have not heretofore made any entry under the homestead laws, except _____.

(Sign plainly with full Christian name.)

Sworn to and subscribed before me this _____ day of _____, 190—, at my office, at _____, in _____ county, _____.

SPECIAL AFFIDAVIT.

(Act June 4, 1897.)

U. S. LAND OFFICE AT _____,
_____, 190—.

_____, being first duly sworn, on oath says he is the identical person who made _____ entry at the U. S. Land Office _____ of the _____, section _____, in township _____ of range _____, containing _____ acres; that he settled upon said land _____; that he built a house thereon of (kind) _____ (size) _____; that he (and his family) ha— lived therein continuously from _____ to _____ (except _____); that he has cultivated _____ acres and raised _____ crops thereon; that he has been over each and every legal subdivision thereof and knows the character of same, and that it is nonmineral in character, and is land subject to entry under the homestead laws; that he has placed thereon improvements to the value of \$_____.
_____.

(Sign plainly with full Christian name.)

¹ Here insert statement that affiant is a citizen of the United States, or that he has filed his declaration of intention to become such, and that he is the head of a family, or over twenty-one years of age, as the case may be. It should be stated whether applicant is *native born* or not, and if not, a certified copy of his certificate of naturalization, or declaration of intention, as the case may be, must be furnished.

Sworn to and subscribed before me this _____ day of _____, 190—, at my office,
at _____, in _____ county, _____.

_____, of _____, _____, and _____, of _____, _____, being first
duly sworn, on oath, each for himself, and not one for the other, say that they know
the above affiant, _____, and the land embraced in his homestead entry
within the _____ Forest Reserve; that they have heard read the above affidavit,
and of their own knowledge know the statements therein made are true; that they
have no interest in said claim or the land sought to be entered in lieu thereof by said
affiant.

Sworn to and subscribed before me this _____ day of _____, 190—, at my office,
at _____, in _____ county, _____.

4-061a.

AFFIDAVIT FOR SELECTIONS

Under act of June 4, 1897 (30 Stat., 36).

(FOREST RESERVES.)

*To be made by the selector, or other credible person cognizant of the facts, before an officer
authorized to administer oaths. Before being sworn, affiant should be advised of penal-
ties of a false oath.*

UNITED STATES LAND OFFICE,

_____, 190—.
_____, being duly sworn according to law, deposes and says that he is a
citizen of the United States, and that his post-office address is _____; that
he is well acquainted with the character and condition of the following-described
land, and with each and every legal subdivision thereof, having personally exam-
ined the same, to wit: _____; that his personal knowledge of said land enables him
to testify understandingly with respect thereto; that there is not, within the limits
of said land, any known vein or lode of quartz or other rock in place bearing gold,
silver, cinnabar, lead, tin, or copper; that there is not, within the limits of said land,
any known deposit of coal, or any known placer deposit, oil, or other valuable min-
eral; that said land contains no salt spring, or known deposits of salt in any form,
sufficient to render it chiefly valuable therefor; that no portion of said land is claimed
for mining purposes under the local customs or rules of miners, or otherwise; that
said land is essentially nonmineral in character, has upon it no mining or other
improvements, and is not in any manner occupied adversely to the selector; and that
the selection thereof is not made for the purpose of obtaining title to mineral land.

I hereby certify that the foregoing affidavit was read to affiant in my presence
before he signed his name thereto; that said affiant is to me personally known (or
has been satisfactorily identified before me by _____), and I verily believe

him to be a credible person and the person he represents himself to be; and that this affidavit was subscribed and sworn to before me at my office in ———, ———, on this ——— day of ———, 190—.

—————,
—————.

SETTLERS ON NAVAJO INDIAN RESERVATION—ACT OF JULY 1, 1902.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 21, 1902.

Register and Receiver, Prescott, Arizona.

GENTLEMEN: Your attention is invited to an act of Congress approved July 1, 1902 (32 Stat., 657), entitled, "An act authorizing the adjustment of rights of settlers on the Navajo Indian reservation, Territory of Arizona," providing:

That all lands claimed by actual settlers or persons to whom valid rights attach, who settled upon or occupied any part of the public lands of the United States prior to the date of the executive order of January sixth, eighteen hundred and eighty, extending the boundaries of the Navajo Indian reservation, in the Territory of Arizona, and which were included in said executive order, are hereby excepted from the operations thereof, and said settlers are hereby granted authority to establish their rights and secure patents for any of said lands to which they have a valid title under the public land laws of the United States.

The only laws applicable thereto, by reason of settlement and occupation, will be the pre-emption, homestead, coal and mineral laws, and the ordinary blanks applicable to each class of entry will be used, but in addition to the usual affidavits you will require each of them to show, by affidavit, the date of settlement on or occupancy of the land to which claim is made, which date must be prior to January 6, 1880, continuing your regular series of numbers, but indicating upon the entry papers and abstracts that the entries are made under the act of July 1, 1902, Navajo Indian reservation lands.

There is but one township therein surveyed, namely, township 26 north, range 28 east, G. and S. R. Meridian, and from the information in this office the two upper tiers of sections only are included in the land affected by this act, and the records of this office do not show any entries for lands therein.

I enclose for your guidance a map of Arizona, on which is delineated, in red ink, the boundaries of the lands to which this act applies, and you will be governed by the terms thereof, and in accordance with the general laws under which claims have been satisfactorily shown to have been initiated prior to the date of said executive order of January 6, 1880.

You will give information of the passage of the act of July 1, 1902, to the local papers as a matter of news.

Very respectfully,

BINGER HERMANN, *Commissioner*.

Approved:

THOS. RYAN, *Acting Secretary*.

CONTEST—HOMESTEAD ENTRY.

JACOBY *v.* KUBAL.

Where a woman makes an application for homestead entry as a deserted wife, and subsequently procures a divorce on the ground of desertion, and entry upon her application is afterward allowed, in a contest against such entry, on the ground of fraud and collusion, the Department is not bound by the finding of fact made by the court in the divorce proceeding, but may determine from the proof whether or not she was a deserted wife at the time of her application.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office, July 24, 1902.* (A. S. T.)

On June 24, 1895, James J. Kubal made homestead entry for the SW. $\frac{1}{4}$ of Sec. 14, T. 96 N., R. 62 W., Mitchell land district, South Dakota.

On August 28, 1895, he relinquished said entry, and filed an application to make entry for the NE. $\frac{1}{4}$ of Sec. 25, T. 27 N., R. 66, same land district. He subsequently applied to amend his application, so as to embrace the NW. $\frac{1}{4}$ of Sec. 29, T. 97 N., R. 65 W., in lieu of the land therein described. His application to make said entry was based on the ground that he could not live on the land first entered by him owing to the presence of poison ivy on the land which seriously affected his health.

By departmental decision of August 19, 1897 (25 L. D., 132), he was allowed to amend his application and to make said entry.

On August 26, 1897, Anna Kubal, claiming to be the deserted wife of Joseph Kubal, applied to make homestead entry for said NW. $\frac{1}{4}$ of Sec. 29, T. 97 N., R. 65 W. Her application was rejected by the local officers for conflict with said application of James J. Kubal, and she appealed to your office.

On September 9, 1897, Jacob Jacoby filed his affidavit, alleging that James J. Kubal was the same person who, under the name of Joseph Kubal, had, on March 26, 1891, made homestead entry for the SW. $\frac{1}{4}$ of Sec. 32, T. 98 N., R. 67 W., in said district. Said affidavit seems to have been filed as a protest against the allowance of said entry to James J. Kubal, but said Jacoby did not apply to make entry for said tract.

On September 25, 1897, Anna Kubal filed the withdrawal by James

J. Kubal of his said application to enter said tract, and at the same time filed her second application to enter the same as the deserted wife of Joseph Kubal.

It seems that a hearing was ordered on Jacoby's said affidavit and set for October 19, 1897, but on October 13, 1897, the local officers held that the withdrawal of James J. Kubal's application was a relinquishment of his right to the land, and was the result of Jacoby's contest, and they awarded to Jacoby a preference right of entry for the land, and rejected said application of Anna Kubal.

On December 17, 1897, Anna Kubal again applied to enter the land, and her application was held to await the determination of the case of James J. Kubal, which had not then been closed, and from that action of the local officers she appealed.

On February 8, 1898, your office held that Jacoby had not earned a preference right of entry; that Anna Kubal was qualified to make entry; that she had kept alive her first application by her appeal, and that her right thereunder attached upon the filing of James J. Kubal's withdrawal of his application, and that she should be allowed to make entry for the land.

Jacoby appealed to this Department, where, on September 14, 1899, a decision was rendered (29 L. D., 168), affirming said decision of your office.

On November 18, 1899, Jacoby filed his protest against the allowance of said entry by Anna Kubal, on the ground that she was not qualified to make such entry; that her said application was made through fraud and collusion with her husband, Joseph Kubal; that she was not a deserted wife, and that she had committed perjury when she swore in her said application that she was such; that she had fraudulently obtained a divorce from her husband, the said Joseph Kubal, in order that she might make said entry.

On December 11, 1899, Jacoby applied to make entry for said land.

On December 29, 1899, Anna Kubal made homestead entry for said tract under section 12 of the act of August 15, 1894 (28 Stat., 286), and receiver's receipt for \$80 was issued to her.

On January 8, 1900, Jacoby filed an amended affidavit, charging that she had committed perjury in making said entry, and that she and the said Joseph Kubal, *alias* Joseph J. Kubal, *alias* James J. Kubal, were then living together as husband and wife, and had done so ever since she filed said application.

A hearing was had, both parties appearing and offering testimony.

On May 4, 1901, the local officers found that the entry was fraudulent from its inception; that it was made through fraud and collusion on the part of the said Anna Kubal and Joseph Kubal; that the said Anna Kubal was not at the time of filing her said application a deserted wife, and that she was therefore not qualified to make said

entry, and they recommended that the entry be canceled and that Jacoby be given a preference right of entry for the land.

She appealed to your office, where, on February 4, 1902, a decision was rendered reversing the action of the local officers, dismissing Jacoby's contest, and holding the entry intact, and from that decision Jacoby has appealed to this Department.

On the hearing the defendant introduced in evidence a certified transcript from the records of the circuit court of Charles Mix county, South Dakota, showing that on September 30, 1897, said court rendered a decree dissolving the bonds of matrimony subsisting between the defendant and Joseph J. Kubal; that said court had jurisdiction of the parties, and that said court found that said Joseph J. Kubal and Anna Kubal were married on July 7, 1890; that they had five children, and that about May 1, 1896, Joseph J. Kubal abandoned and deserted the said Anna Kubal, without justifiable cause, and continued to so abandon and desert her up to the time of the rendition of said decree. It is also recited in said decree that Joseph J. Kubal made no appearance or defence to said action, and she objected to the introduction of any evidence by the contestant, except such as would tend to show that she had remarried subsequent to said divorce and prior to making said entry, on the ground that all allegations in said affidavit of contest, except that she was the wife of Joseph Kubal, were *res judicata*.

The proof shows that Joseph Kubal is the same person who by the name of James J. Kubal made said entry, on June 24, 1895, for the SW. $\frac{1}{4}$ of Sec. 14, T. 96 N., R. 62 W., and who, on August 28, 1895, relinquished said entry and applied to enter the NE. $\frac{1}{4}$ of Sec. 25, T. 27 N., R. 66, which application he was allowed to amend so as to embrace the land in controversy.

It is shown by the testimony of several persons who lived near them, and saw them often from 1895 to the time of the hearing, that Joseph Kubal and Anna Kubal, during all that time, lived together as husband and wife; that he managed their affairs as head of the family, and that he spoke of her, in her presence, as his wife; and the proof shows that he accompanied her to the land office when she first applied to enter the land in question, as his deserted wife, and that at the very moment when she filed said application alleging that she was his deserted wife he was taking care of their children in a room near the land office. In fact, it is clearly shown by the proof that he has never deserted her, but up to the time of the hearing continued to live with her and to speak of her, in her presence, as his wife; he was there when the notice of contest was served on her, and on being told by the officer that he had a notice to serve on his wife, who was present, he pointed to her and said: "there she is."

Both Joseph Kubal and Anna Kubal were examined as witnesses in

her behalf, and their testimony in many material respects is shown to be false by the testimony of divers disinterested witnesses, and the local officers before whom they testified say in their report that "it is apparent they have not the slightest regard for the solemnity of an oath," and they characterize their effort to acquire the land in question as "one of the most flagrant and audacious pieces of fraud ever attempted to be perpetrated upon the government," and the evidence fully warrants that finding.

But it is insisted that inasmuch as it was found by said circuit court in said divorce proceeding that the defendant was deserted by her husband about May 1, 1896, and that he continued such desertion up to September 30, 1897, that therefore this Department can not in this proceeding inquire into the question of desertion, but is bound by the finding of said court upon that question, the substance of the contention being that it is immaterial whether or not she was actually a deserted wife, it being sufficient to show that said court, from the proof offered in said divorce suit, found her to have been such at the time when she filed said application.

It is, however, not necessary to inquire into the good faith of the divorce proceedings, nor will this Department do so. Whether said proceedings were in good faith or not, this Department is not bound to accept the findings of facts made by the court in the divorce proceedings as conclusive in this case, and the contestant had a right to show by proof, as he has done, that at the time Anna Kubal filed her application she was not a deserted wife and was therefore not qualified to make a homestead entry. But it is argued that, although at the time she filed her application she may not have been qualified to make the entry, yet at the time when she made the entry, which was subsequent to the divorce, she was an unmarried woman, the head of a family, and hence qualified to make entry, and this seems to have been the case, because, however fraudulent may have been the divorce proceeding, the decree of the court granting the divorce was valid, and gave to her all the rights and privileges of an unmarried person, and she was thereafter consequently qualified to make an entry. But before she made the entry Jacoby had filed his affidavit, charging fraud and collusion between her and Joseph Kubal in the filing of her application, and he had also filed his application to make entry for the land, and her said entry should not have been allowed in advance of a hearing on Jacoby's affidavit and a determination of his rights in the premises.

Not only was this entry fraudulent from its inception, for the reasons hereinbefore stated, but it was evidently made for the benefit of Joseph Kubal; he had acquired title to one tract of land under the homestead laws; had sold it for \$1,000; had made entry for another tract which he relinquished and applied for the land in controversy; Jacoby had filed his affidavit of protest, in which he charged that Kubal had

exhausted his homestead right, and Kubal, fearing that his application would be rejected, withdrew the same in favor of Anna Kubal, who was then his wife, and with whom he was then living; and all the circumstances in the case indicate that her entry was made for his benefit.

Your said decision is therefore reversed, said entry of Anna Kubal will be canceled, and Jacoby will be allowed to make entry for the land.

SCHOOL LAND—INDEMNITY—ACT OF MARCH 3, 1893.

STATE OF WASHINGTON *v.* NORTHERN PACIFIC RY. CO.

The preference right of selection granted to certain States, including the State of Washington, by the act of March 3, 1893, includes the right to select indemnity for losses occurring to the grant made to said State in support of common schools.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) July 25, 1902. (F. W. C.)

The Northern Pacific Railway Company has appealed from your office decision of February 24, last, holding for cancellation its indemnity selection made of the S. $\frac{1}{2}$ of NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, and E. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 17, and all of Sec. 29, T. 31 N., R. 38 E., Spokane land district, Washington, for conflict with the selection made of said lands by the State of Washington, as indemnity for certain specified school sections lost in place.

The lands in question are within the indemnity limits of the grant made in aid of the construction of the Northern Pacific railroad, and the plat of survey of the township was officially filed April 3, 1901. On that day the Northern Pacific Railway Company filed in the local land office its list of indemnity selections, No. 54, including the tracts here in question, which was accepted by the local officers upon the proper payment of fees.

May 20, following, there was filed in the local land office a list of selections in lieu of school sections lost in place, which list included the tracts here in question, and said list was rejected by the local officers for conflict with the prior indemnity selection filed by the Northern Pacific Railway Company. From said rejection the State appealed, claiming a preference right of selection under the act of March 3, 1893 (27 Stat., 592).

Your office decision sustains the claim of the State and for that reason holds the selection by the railway company for cancellation; from which appeal has been taken to this Department.

It is claimed on behalf of the railway company that this preference right of selection, granted the State by the act of March 3, 1893, was merely to fill its grants of quantity made by the act of February 22, 1889 (25 Stat., 676), and did not include the right to make selection

under its school grant in lieu of losses occurring in sections 16 and 36 in place. It is also claimed that the State has selections of record under its school grant exceeding the total amount of lands lost in place.

Did the preference right of selection granted by the act of March 3, 1893, include the right to select indemnity for losses occurring to the grant made to the State in support of common schools?

By said act it is provided that certain States, among them the State of Washington—

shall have a preference right over any person or corporation to select lands subject to entry by said States granted to said States by the act of Congress approved February 22, 1889, for a period of sixty days after lands have been surveyed and duly declared to be subject to selection and entry under the general land laws of the United States.

It is but necessary therefore to inquire whether the act of February 22, 1889, made a grant in lieu of school sections lost in place, for if it did this right of selection is clearly included within the preference right of selection granted the State by said act of 1893.

Section ten of the act of February 22, 1889, *supra*, grants to the proposed State of Washington, together with other proposed States therein named, upon their admission into the Union, sections numbered 16 and 36, in every township of said proposed States—

and where such sections, or any parts thereof, have been sold or otherwise disposed of, by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior.

This act clearly grants to the State of Washington other lands in lieu of the portions of sections 16 and 36 lost in place, and it follows that the right to make such selections is clearly included within the preference granted to the State of Washington by the act of March 3, 1893, *supra*. This being so, any selection made by the railway company within the period of preferred right of selection granted to the State, is subject to the assertion of that right by the State within the time named. The selection in question having been made within the period of sixty days after the township plat was duly declared filed and the lands therein held to be subject to selection and entry, the local officers erred in rejecting said selection.

Relative to the claim that the State has of record selections made under the school grant in excess of the total amount of lands lost in place, it is but necessary to say that in making indemnity school selections the State is required to state a basis for each selection, so that the grant can not be exceeded unless the same loss is used more than once.

There is no claim made that the bases assigned for the selections in question are for any reason faulty, and your office decision finds them to be good. Said decision is therefore accordingly affirmed, and, upon completion of the selection by the State, within a time to be fixed by your office, the selection by the railway company will be canceled.

LANDS IN FORMER UTE INDIAN RESERVATION SUBJECT TO HOMESTEAD
ENTRY—ACT OF JUNE 13, 1902.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 25, 1902.

REGISTERS AND RECEIVERS,
*Glenwood Springs, Gunnison,
Montrose, and Durango, Colorado.*

GENTLEMEN:

Your attention is called to the provisions of the act of Congress of June 13, 1902 (32 Stat., 384), entitled "An act providing for free homesteads in the Ute Indian reservation in Colorado," which reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the homestead laws be, and are hereby, extended over and shall apply to the lands included within the limits of the former Ute Indian reservation in Colorado not included in any forest reservation, in addition to the provisions of existing laws relating to cash entries thereon: *Provided,* That no selection or entry of lands in lieu of land included within a forest reservation or of soldiers' or sailors' additional homesteads shall be allowed within said limits:

SEC. 2. That all sums of money that may be lost to the Ute Indian fund by reason of the passage of this act shall be paid into the fund by the United States, and all moneys received by reason of the commutation of any homestead entry shall be credited to said Ute Indian fund.

SEC. 3. That no lands shall be included in any location or settlement under the provisions of this act on which the United States Government has valuable improvements.

You will observe that the law makes no change in existing laws relating to entries of these lands, beyond extending the provisions of the homestead laws over all of the vacant lands in said reservation, excepting lands included in any forest reservations, and lands on which the United States Government has valuable improvements.

You will also observe that no selection or entry of lands, in lieu of land included within a forest reservation, or of soldiers' or sailors' additional homesteads can be allowed for these lands.

Homestead entrymen under this act will be required to pay the usual fee and commissions, and for excess in area over 160 acres, whenever any occurs. You will also require entrymen who commute their

entries to pay, in addition to the price per acre, the usual final homestead commissions.

You will open a separate series of numbers for the homestead entries, beginning with number one, reporting them in separate and special abstracts, and report and account for the same in your regular monthly and quarterly Ute Indian reservation account. Commutation entries under the act should be given the regular serial numbers of the Ute Indian reservation cash entries, and the money accounted for as in those cases.

Very respectfully,

BINGER HERMANN, *Commissioner*.

Approved:

THOS. RYAN, *Acting Secretary*.

NEW MEXICO—SCHOOL LAND—SALINE LAND—ACT OF JUNE 21, 1898.

TERRITORY OF NEW MEXICO.

Until the passage of the act of January 31, 1901, the policy of the government was to reserve saline lands from disposition under any of the public land laws, whether relating to the disposition of agricultural lands or relating to the location and purchase of mineral lands, excepting as provided by the act of January 12, 1877.

The grant made by section 1 of the act of June 21, 1898, is a grant *in præsenti*, and upon the approval of said act the absolute title in fee to all sections 16 and 36 in the Territory of New Mexico which were then identified by the public surveys became immediately vested in said Territory, in so far as such sections embraced lands not known to be otherwise than of the character subject to the grant.

Land in a surveyed section numbered 16 or 36 in the Territory of New Mexico, known to be saline in character at the date of the act of June 21, 1898, did not pass to the Territory under the grant of said sections for the support of common schools made by section 1 of said act, but passed to the Territory under the grant of saline lands by section 3 thereof. Land in a surveyed section numbered 16 or 36 not known to be saline in character at the date of said act, passed to the Territory under the grant made by section 1.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) *July 26, 1902.* (A. B. P.)

The Department is in receipt of a communication of your office, dated July 8, 1902, relating to the listing by the Territory of New Mexico of the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 36, T. 3 N., R. 19 W., Santa Fe land district, as having passed under the grant of saline lands to said Territory, for university purposes, made by section 3 of the act of June 21, 1898 (30 Stat., 484).

The question presented by the communication is, whether the tract described inured to the Territory under the grant to it of sections 16 and 36 in every township therein, for the support of common schools,

made by section 1 of the act referred to, or under the grant of saline lands for university purposes made by section 3 of said act.

The provisions of said sections 1 and 3, in so far as material here, are as follows:

That sections numbered sixteen and thirty-six in every township of the Territory of New Mexico, and where such sections, or any parts thereof, are mineral or have been sold or otherwise disposed of by or under the authority of any act of Congress, other non-mineral lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said Territory for the support of common schools, such indemnity lands to be selected within said Territory in such manner as is hereinafter provided:

Sec. 3. That lands to the extent of two townships in quantity, authorized by the sixth section of the act of July twenty-second, eighteen hundred and fifty-four, to be reserved for the establishment of a university in New Mexico, are hereby granted to the Territory of New Mexico for university purposes, to be held and used in accordance with the provisions in this section; and any portions of said lands that may not have been heretofore selected by said Territory may be selected now by said Territory. That in addition to the above, sixty-five thousand acres of non-mineral, unappropriated and unoccupied public land, to be selected and located as hereinafter provided, together with all saline lands in said Territory, are hereby granted to the said Territory for the use of said university, and one hundred thousand acres, to be in like manner selected, for the use of an agricultural college. That the proceeds of the sale of said lands, or any portion thereof, shall constitute permanent funds, to be safely invested, and the income thereof to be used exclusively for the purposes of such university and agricultural college, respectively.

The uniform policy of the government since the inauguration of the public land system has been to reserve lands containing valuable deposits of mineral, of any kind or nature, from grants for the benefit of schools, to aid in the construction of railroads, or for other public purposes, whether expressly excluded from such grants or not; and until the passage of the act of January 31, 1901 (31 Stat., 745), whereby all unoccupied lands of the United States containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, were declared to be subject to location and purchase under the provisions of the law relating to placer mining claims, the policy of the government was to reserve saline lands from disposition under any of the public land laws, whether relating to the disposal of agricultural lands or relating to the location and purchase of mineral lands, excepting as provided by the act of January 12, 1877 (19 Stat., 221), the provisions of which are not material here. (See *Morton v. Nebraska*, 21 Wall., 660; *Salt Bluff Placer*, 7 L. D., 549; *Southwestern Mining Co.*, 14 L. D., 597.)

In addition to the stated general and uniform policy of the government to reserve saline and other mineral lands from disposition otherwise than under laws specially providing for their disposal, it is to be observed that mineral lands were expressly excluded from the grant of sections 16 and 36 to the Territory of New Mexico by section 1 of

the act of June 21, 1898, for the support of common schools, and other lands were granted in lieu thereof.

The grant by section 1 of the act was and is in terms a grant *in presenti*, and upon the approval of the act the absolute title in fee to all sections 16 and 36 in the Territory which were then identified by the public surveys became immediately vested in the Territory, in so far as such sections embraced lands not then known to be otherwise than of the character subject to the grant. With respect to lands which were not surveyed at the date of the act, the grant would attach to sections 16 and 36 of the various townships, and the title thereto become vested in the Territory, whenever such sections should thereafter be identified by survey, except to the extent that at the date of the survey the same might be known to embrace lands not of the character contemplated by the grant.

The records of the General Land Office show that the section 36, embracing the tract here in question, was surveyed long prior to the passage of the act of June 21, 1898. Whether said tract inured to the Territory under the grant of sections 16 and 36 made by section 1 of the act, or under the grant of saline lands made by section 3 of the act, depends, therefore, upon whether the land was known to be saline in character at the date of said act. If it was known saline land at the date of the act it did not pass to the Territory under the grant by section 1, but did pass to the Territory under the grant of saline lands by section 3. If the tract was not known to be saline in character at the date of the act, then it passed to the Territory under the grant by said section 1.

As there is nothing in the communication of your office to show whether the tract in question was known saline land at the date of the act of June 21, 1898, it can not be now decided whether the same inured to the Territory under section 1 or under section 3 of said act. You are therefore directed to ascertain the facts with respect to the matter, and to thereupon adjudicate the case in accordance with the principles herein announced. The list embracing the tract in question, submitted with your said communication, is, for the reasons herein stated, returned without my approval. When it shall have been determined whether said tract inured to the Territory under section 1 or section 3 of the act of 1898, the list will be resubmitted with or without the tract in question, as may be, in accordance with the determination made.

INSTRUCTIONS RELATIVE TO SALE OF UMATILLA INDIAN RESERVATION LANDS, OREGON—ACT OF JULY 1, 1902.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 29, 1902.

Register and Receiver, Lagrande, Oregon.

GENTLEMEN:

I inclose herewith a printed copy of the act of Congress approved July 1, 1902 (32 Stat., 730), providing for the sale of the unsold portion of the Umatilla Indian reservation.

The law directs that the lands which were not sold at the public sale of said lands heretofore held, at the price for which they had been appraised, under the provisions of the act of March 3, 1885 (23 Stats., 340), shall be sold at private sale at not less than the appraised value thereof, and in conformity with the provisions of said act, thereby changing the former law only as to the manner of disposal of said lands, and giving a preference right to *bona fide* settlers thereon who have, prior to July 1, 1902, settled and made substantial improvements upon any of said lands with the intent of permanently residing upon the same as a homestead, to purchase the lands so settled upon at any time within ninety days after that date.

The amount that any applicant may purchase is still limited to one hundred and sixty acres of untimbered lands and an additional forty acres of timbered lands; and no person will be permitted to purchase timbered lands unless he is also the purchaser of untimbered lands.

The terms of payment will be the same as under former sales, viz.: for untimbered lands, one-third at the time of purchase, one-third in one year, and one-third in two years from date of sale, with interest on the deferred payments at the rate of 5 per cent per annum. At the time of making the second payment, one year's interest on the third payment must also be collected. Full payment must be made for timbered lands at the date of purchase.

In cases of particular tracts on which improvements were situated and appraised, such appraised valuation is in addition to the price of the land, and must be paid in full at the time of the purchase. In any such cases there will be inserted in the prescribed form for receipt the words "*and the improvements thereon valued at \$—,*" giving the amount of appraisement.

Each purchaser will be required to make affidavit that he is purchasing said lands for his own use and occupation, and not for, or on account of, or at the solicitation of, any other person; that there is no other party having a superior right as a prior settler thereon; that he has made no contract whereby the title thereto shall, directly or indi-

rectly, inure to the benefit of another. And if any conveyance or contract is made touching the same, or any lien thereon created before the issuing of the patent, such conveyance, contract, or lien shall be absolutely null and void.

No patents will be issued for untimbered lands until the purchaser shall have made all the payments, and also satisfactory proof that he has resided on the land purchased at least one year and reduced at least twenty-five acres to cultivation. A purchaser desiring to make proof of residence and cultivation of the land under this act will be required to file with the register a written notice of his intention to do so, in the manner prescribed under the homestead laws, and the register will thereafter cause such notice to be duly posted and published.

The proof, which must consist of the testimony of two witnesses and the claimant, accompanied by his final affidavit, must be made before the register or receiver, and the homestead proof forms will be used, modified when necessary.

For the payments made the receiver will issue his receipt in duplicate, to be numbered consecutively in the order of their issue in the existing Umatilla Indian Land Series, the duplicate to be delivered to the purchaser and the original to be sent to this office with a corresponding abstract.

In the event of the failure of any purchaser to make any payment when the same becomes due, the Secretary of the Interior shall cause said land to be again offered at private sale, after notice to the delinquent; and if said land shall sell for more than the balance due thereon, the surplus, after deducting expenses, shall be paid over to the first purchaser.

In compliance with the provisions of said law, conferring upon *bona fide* settlers upon any of said lands, with the intent of permanently residing upon the same as a homestead, a preference right to buy the land so settled upon, any settler will be permitted to exercise said right to purchase the tract, settled upon by him prior to July 1, 1902, at any time within ninety days thereafter, upon his making affidavit, duly corroborated by two witnesses, setting forth the date of his settlement, a statement specifically describing the improvements owned by him and their value, and that he so settled upon and improved said lands with the intent of permanently residing on the same as a homestead, but he will also be required to file the same affidavit prescribed for others; and he may, if he has resided upon and cultivated such lands for the required period, at any time thereafter submit proof thereof in the manner hereinbefore prescribed.

As the right to purchase timber lands is dependent upon the purchase of untimbered lands, no certificate will be issued to the purchaser of timbered lands until full payment and proof have been made on the untimbered land purchased by the party, when, if the proof of com-

pliance with the requirements of the law is satisfactory, the register will issue his certificate for the entire area purchased, numbering such certificates consecutively.

The forms for affidavits, receipts, and certificates heretofore used in connection with the public sale of the Umatilla Indian lands will be used, modifying the same as may be necessary for compliance herewith.

Notice of the sale has been sent to the *Journal*, La Grande, Oreg., and the *Tribune*, Pendleton, Oreg., for publication, the date upon which the sale is to commence being fixed for September 15, 1902.

Very respectfully,

BINGER HERMANN, *Commissioner*.

Approved:

THOS. RYAN, *Acting Secretary*.

[32 Stat., 730.]

An Act To provide for the sale of the unsold portion of the Umatilla Indian Reservation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all the lands of the Umatilla Indian reservation not included within the new boundaries of the reservation and not allotted or required for allotment to the Indians, and which were not sold at the public sale of said lands heretofore held at the price for which they had been appraised, and upon the conditions provided in an act entitled "An act providing for allotment of lands in severalty to the Indians residing upon the Umatilla reservation, in the State of Oregon, granting patents therefor, and for other purposes," shall be sold at private sale by the register of the land office in the district within which they are situated at not less than the appraised value thereof, and in conformity with the provisions of said act: *Provided*, That any *bona fide* settler upon any of said lands who is the owner of substantial improvements thereon, and who has so settled and improved any subdivision of said lands, with the intent of permanently residing on the same as a homestead, shall have a preference right to buy the lands so settled upon by him at any time within ninety days after the passage of this act, upon making satisfactory proof in the local land office as to settlement, intent, and improvements.

Approved, July 1, 1902.

RAILROAD GRANT—CLASSIFICATION—ACT OF FEBRUARY 26, 1895.

NORTHERN PACIFIC RY. CO.

The act of February 26, 1895, limited the classification of lands within the limits of the Northern Pacific land grant in the State of Idaho to the Coeur d'Alene land district, and where lands in said State outside of that district were classified as non-mineral by mineral land commissioners appointed under said act, and the classification approved, notice of the listing or selection of such lands will be required to be given, as to such of the lands as are within six miles of a mining claim, in the manner provided by the regulations of July 9, 1894, notwithstanding such classification and approval.

In the absence of further legislation, the land department is without authority to patent to the Northern Pacific Railroad Company, or its successor in interest, any lands within the land districts named in the act of February 26, 1895, prior to the examination and classification of said lands as non-mineral, provided for in said act.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office, July 29, 1902.* (F. W. C.)

Your office letter of the 6th ultimo calls attention to the fact that the classification made by the mineral land commissioners for the Coeur d'Alene land district, during the month of May, 1899, which classification was approved by the Department February 20, 1900, included certain lands outside of the Coeur d'Alene land district and within the Lewiston land district, Idaho. These lands, it appears, were classified by the commissioners as non-mineral lands, but as the act of February 26, 1895 (28 Stat., 683), limited the classification of lands in the State of Idaho to the lands within the Coeur d'Alene land district, you recommend that said classification be not regarded and that the railroad company in listing or selecting these lands be required to give notice as to such of the lands as are within six miles of a mining claim, in the manner provided by the regulations of July 9, 1894 (19 L. D., 21). In this recommendation the Department concurs, and you will, in disposing of any listings or selections, proceed as indicated.

In said letter attention is also called to the fact that certain portions of sections 23 and 27, T. 43 N., R. 4 W., in the Coeur d'Alene land district, have not, so far, been classified as provided for in the act of 1895. The Northern Pacific Railroad Company has, however, made selection of these lands and you recommend that it be permitted to give notice and proceed as required by the regulations of July 9, 1894, *supra*. The act of 1895 providing for the classification of the lands within the limits of the Northern Pacific land grant, in certain land districts, provides:

SEC. 7. That no patent or other evidence of title shall be issued or delivered to said Northern Pacific Railroad Company for any land in said land districts until such land shall have been examined and classified as nonmineral, as provided for in this act, and such patent or other evidence of title shall only issue then to such land, if any, in said land districts as said company may be, by law and compliance therewith and by the said classification, entitled to, and any patent, certificate, or record of selection, or other evidence of title or right to possession of any land in said land districts, issued, entered, or delivered to said Northern Pacific Railroad Company in violation of the provisions of this act shall be void: *Provided*, That nothing contained in this act shall be taken or construed as recognizing or confirming any grant of land or right to any land in the said Northern Pacific Railroad Company, or as waiving or in any wise affecting any right on the part of the United States against the said Northern Pacific Railroad Company to claim a forfeiture of any land grant heretofore made to said company.

Appropriations have been made from time to time for payment of expenses incident to the classification of lands as provided for in the act of 1895, the last appropriation being found in the act of June 6, 1900 (31 Stat., 588, 615), which act appropriated \$25,000 "to complete the examination and classification of certain lands within the land grant and indemnity land grant limits of the Northern Pacific Railroad Company in the Helena and Missoula land districts in the State of Montana and in the Coeur d'Alene land district in the State of Idaho, with special reference to the mineral or non-mineral character of such lands, as authorized by the act of February twenty-six, eighteen hundred and ninety-five (Twenty-eight Statutes, six hundred and eighty-three)," . . . This appropriation has been exhausted but the classification of all of the lands in said land districts has not been completed.

It may be that no further appropriation will be made for the completion of the classification of the lands in these districts, but in view of the plain provisions of section seven of the act of 1895, before quoted, in the absence of further legislation, this Department is without authority to patent to the Northern Pacific Railroad Company, or its successor in interest, any of the land within the land districts named in said act, prior to the examination and classification of said lands as nonmineral, as provided for in said act.

The recommendation of your office with regard to these lands is not therefore approved.

RAILROAD GRANT—SELECTION—SECTION 4, ACT OF MARCH 2, 1899.

NORTHERN PACIFIC RY. CO. *v.* PYLE.

The fact that a tract of unsurveyed land included in a list of selections filed by the Northern Pacific Railway Company under the provisions of section four of the act of March 2, 1899, was properly described in said list according to the description thereof in the official survey subsequently approved, does not relieve the company from filing a second list, within three months after the plat of survey of the township in which the land is situated is filed in the local land office, describing such tract according to such survey, as required by said section; and failure to file such second list within the required time subjects the land to intervening claims.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office, July 31, 1902.* (F. W. C.)

The Northern Pacific Railway Company has appealed from your office decision of March 20, last, holding for cancellation its selection of the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 28, T. 37 N., R. 2 E., Lewiston land district, Idaho, with a view to permitting Harrie E. Pyle to include the same, by way of amendment, within his homestead entry.

The Northern Pacific Railway Company made selection of the tract in question September 14, 1899, while the land was yet unsurveyed, under the provisions of the act of March 2, 1899 (30 Stat., 993), in lieu of an equal quantity of land relinquished within the Mt. Ranier National Park and Pacific forest reserve.

The plat of survey of the portion of the township in question was officially filed April 25, 1900, and on that day Harrie E. Pyle tendered his homestead application, including in addition to the tract here in question, the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$, of Sec. 27, of said township. Said application was rejected as to the tract here in question for conflict with the prior selection by the Northern Pacific Railway Company, from which rejection Pyle duly appealed to your office.

It appears that while said appeal was pending, to wit, on July 5, 1900, the local officers permitted Pyle to make homestead entry for the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 27. His appeal from the action of the local officers rejecting his application was considered by your office July 25, 1901, when a hearing was ordered to determine the status of the tract in question at the date of the selection by the railway company.

From the evidence adduced at said hearing it appears that the tract in question was occupied by one Frank R. Sanders at and prior to the date of the selection by the railway company, and that he made improvements thereon of some value. Sanders continued to occupy and improve the tract until December 7, 1899, when he sold his possessory claim and improvements to Pyle, who immediately took possession and, with his family, has continued to reside upon and improve this tract since about January 1, 1900.

From Pyle's testimony given at said hearing, it appears that he made his homestead entry with the understanding that thereby he would not lose any right to the tract here in question in case he was successful in his contest with the railway company.

Your office decision holds that the tract in question was subject to selection by the railway company September 14, 1899, because the settlement claim then being asserted for this land was subsequently abandoned, the present applicant not succeeding to the rights of the prior settler by the purchase of his improvements, but said selection is held for cancellation for the reason that it was not until August 29, 1901, more than a year after the filing of the plat of survey of this township, that the railway company filed a new list of selections conformable to the requirements of the act of March 2, 1899, under which its selection of the tract in question was made, Pyle's claim intervening.

In its appeal the company urges error in failing to give full recognition to its selection of September 14, 1899, as the same correctly described the land according to the township plat of the survey sub-

sequently filed. From the decision of the local officers it seems that the land in contest had been actually surveyed in the field prior to the selection by the railway company on September 14, 1899. As the survey had not been approved, however, and the plat officially filed, it was, to all intents and purposes, unsurveyed land, and the selection of September 14, 1899, must be treated as a selection of unsurveyed land.

Section 4 of the act of March 2, 1899, *supra*, under which the selection in question was made, provides that—

In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty; and within the period of three months after the lands including such tract shall have been surveyed and the plats thereof filed by [in] said local land office, a new selection list shall be filed by said company, describing such tract according to such survey; and in case such tract, as originally selected and described in the list filed in the local land office, shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity.

It will thus be seen that where selection is made of unsurveyed land, the company is required to file a new selection list, conformable to the lines of the official survey, within three months after the plat of survey of the township is filed in the local land office, and the fact that the list filed before survey described the lands according to the description of the official survey subsequently approved, does not relieve the company from the duty of filing a second list as required by the statute. It is not until the filing of this new or second list that a selection originally made of unsurveyed land becomes a completed selection, and a failure on the part of the company to file such new or second list within the required time subjects the land to an intervening claim.

The record in this case shows that a large portion of the improvements made by both Sanders and Pyle are upon the forty-acre tract here in question, and the homestead claim of Pyle, regularly asserted, although initiated after the preliminary selection made by the railway company, should be recognized, the company having failed, within three months after the filing of the township plat in the local land office, to file a new list of selections conformable to the plat of survey.

Since your office decision Pyle has tendered a formal application to amend his existing homestead entry to include the tract here in question, which application is herewith returned, with the remaining papers in the case, and upon completion of said amendment, within a time to be fixed by your office, the selection by the company will be canceled.

Your office decision is accordingly affirmed.

BOUNTY LAND WARRANT—ASSIGNMENT—ACT OF AUGUST 30, 1890.

JOHN W. CLARKSON.

The general provision in the act of August 30, 1890, limiting the amount of land to which title may be acquired by any one person, under the public land laws, to three hundred and twenty acres, has no application to the location of military bounty land warrants held by assignment under the special provisions of section 2414 of the Revised Statutes.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office, July 31, 1902.* (A. S. T.)

On June 23, 1900, John W. Clarkson located lot 5, the NE. $\frac{1}{4}$ of Sec. 6, T. 29 N., R. 4 W., Ironton land district, Missouri, containing eighty acres, with military bounty land warrant No. 48232, issued on September 3, 1858, to Thar-cah-mi-qui, warrior, for eighty acres, under the act of March 3, 1855, and regularly assigned to said Clarkson.

Your office, on February 19, 1902, held said location for cancellation on the ground that it appears that Clarkson had previously acquired three hundred and twenty acres of agricultural land by cash entry, and that under the act of August 30, 1890 (26 Stat., 391), he could not acquire more than three hundred and twenty acres of such lands, and as the eighty acres located with said land warrant would, together with the three hundred and twenty acres already entered, amount to more than he was allowed to enter under said act, said location must be canceled.

Clarkson has appealed to this Department, his contention being that inasmuch as military bounty land warrants are by law assignable, and inasmuch as the assignee of such warrant is by law entitled to all the rights of the original holder thereof, therefore, he has the right to purchase an unlimited number of such warrants and to locate public lands with the same.

There is no statute limiting the number of such warrants that may be purchased by one person, but the act of August 30, 1890, limits the number of acres of public lands that may be acquired by one person who enters upon the same after its passage, under any or all of the public land laws.

The act of August 30, 1890, *supra*, provides that:

No person who shall, after the passage of this act, enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws, shall be permitted to acquire title to more than three hundred and twenty acres, in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry, or settlement is validated by this act.

This legislation is general in its character, and should not be construed to deprive persons of rights under special legislation, and it will be seen that the holder of this warrant, under section 2414,

Revised Statutes, occupies the status of one who is peculiarly protected. The statute reads as follows:

All warrants for military bounty lands which have been or may hereafter be issued under any law of the United States are declared to be assignable by deed or instrument of writing, made and executed according to such form and pursuant to such regulations as may be prescribed by the Commissioner of the General Land Office, so as to vest the assignee with all the rights of the original owner of the warrant or location.

It will thus be seen that the assignee in this instance is entitled to all of the rights of the original owner of this warrant, and to hold that the act of 1890 operates as a limitation upon the assignee is equivalent to holding that the original owner, by reason of said act, would not be entitled to locate this warrant.

The Department has heretofore had occasion to consider the effect of general legislation as bearing upon the provisions of statutes that confer special privileges upon persons included therein, as in the case of Victor H. Provensal (30 L. D., 616), wherein it was held that the special provisions of the act of June 2, 1858, relating to the location of surveyor-general's certificates of location upon lands subject to sale at private entry are in no manner affected by the general provisions of the act of March 2, 1889, restricting the sale of public lands at private entry to the State of Missouri. In the consideration of this case a number of authorities are cited, and it may be said that they bear equally upon the question now presented. It is therefore held that the present holder of this warrant is not affected by the provisions of the act of 1890.

Your decision is accordingly reversed.

MINING CLAIM—BURDEN OF PROOF—ACT OF JUNE 3, 1878.

PURTLÉ *v.* STEFFEE.

In a controversy between conflicting claimants to the same land, arising upon protest by a mineral locator against an application to purchase under the act of June 3, 1878 (amended by the act of August 4, 1892), where it appears that the land, when surveyed, was returned as of little if any value for agricultural purposes and chiefly valuable for the timber thereon, and the final proof submitted in support of such application appears to be sufficient in form and substance, the burden of proof at a hearing upon such protest rests upon the protestant.

Where in such a case the evidence fails to show that the land in controversy contains valuable deposits of mineral, and it appears that the discovery on the strength of which the mineral location was made consisted of the digging of a prospect hole to the depth of ten feet, in which about two cents' worth of gold was found, and ample time and opportunity were afforded prior to the hearing to test the extent and value of the alleged mineral deposits, without any systematic or continuous prospecting or working of the claim having been done, it can not be held that such a location is a mining claim within the meaning of said act of June 3, 1878.

The case of *Michie v. Gothberg*, 30 L. D., 407, cited and distinguished.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *October 30, 1901.* (A. B. P.)

October 21, 1899, Perry Steffee filed his sworn statement and application to purchase, under the act of June 3, 1878 (20 Stat., 89), amended by act of August 4, 1892 (27 Stat., 348), the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and lot 5 of Sec. 6, T. 14 N., R. 24 W., Missoula, Montana. After notice duly given he submitted final proof in support of his application, January 2, 1900.

On the date last mentioned John Purtle filed his protest against said application, alleging the land described to be "valuable mineral land;" that the same "contains rich deposits of placer gold;" that protestant is the owner of two several placer mining claims embracing portions of said land, one known as the "Golden Scepter," located July 14, 1899, and the other as the "Blue Jay," located April 7, 1898; and that he has expended over \$500 in the development of the "Blue Jay" claim. Upon motion of protestant, leave was given him to cross-examine the applicant and his final-proof witnesses, which was done. The next day Purtle filed the affidavit of two persons corroborative of his protest, and thereupon a hearing was ordered to determine the issues presented. Both parties appeared and submitted testimony. The local officers placed the burden of proof upon the applicant, and upon the testimony found that he had not shown the land to be "actually more valuable for its timber than for its mineral." The applicant appealed.

By decision of March 2, 1901, your office held that it was error to require the applicant to bear the burden of proof, and upon consideration of the record with the burden upon the protestant, further held that the land was not shown to possess any mineral value or to have upon it any mining claims or mining improvements "made and maintained in good faith." The finding below was reversed and the protest dismissed. The protestant thereupon appealed.

The first question to be considered relates to the burden of proof. The appellant contends that this burden was improperly placed upon him by your office decision. It is stated in said decision that the land, when surveyed, was returned "as of little if any value for agricultural purposes, soil poor, rough and mountainous and chiefly valuable for timber." The correctness of this statement is not questioned. The return is in entire harmony with the requirement of the statute that land to be subject to disposal thereunder must be "unfit for cultivation, and valuable chiefly for its timber or stone." The final proofs of the applicant, submitted before the hearing was ordered, appear to be sufficient in form and substance. The cross-examination of the witnesses elicited nothing that would have justified the rejection of the proofs. Under these circumstances there can be no doubt that

the burden of proof was properly placed by your office, and in this respect there is no error in your said decision.

The statute upon which the applicant bases his claim provides—

That nothing herein contained shall defeat or impair any *bona fide* claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any *bona fide* settler, or lands containing gold, silver, cinnabar, copper, or coal.

It is also provided that an applicant under the statute shall make oath, among other things, that the land applied for—

contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belonged to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal.

In view of these provisions of the statutes the further questions presented by the record are: (1) Does the land in controversy contain valuable deposits of placer gold? (2) Is there upon the land any mining claim, or mining improvements?

After a careful examination and consideration of the voluminous testimony submitted, the Department is clearly of the opinion that both questions must be answered in the negative. It appears that deposits of gold in placer formation have been found in small quantities upon the land by persons who have prospected the same at various times, but the evidence, as a whole, falls far short of proving the land to possess any appreciable actual value on account of such deposits.

Nor is it shown that the land has upon it any mining claim, or mining improvements, within the meaning of the statute. The "Blue Jay" location, to which the testimony chiefly relates, is alleged to have been made April 7, 1898. The proof of discovery to support the location, according to the testimony of one of the locators called as a witness for the protestant, is to the effect that a prospect hole was dug to the depth of ten feet, in which about ten colors of gold, worth about two cents, were found, and "on the strength of this amount of gold" the location was made. The hearing took place nearly two years after the date of the location. There is nothing in the record to show that up to the date of the hearing there had been any systematic or continuous prospecting or working of the claim, although ample time and opportunity had been afforded the protestant and his grantors to test, in some measure at least, the extent and value of the gold deposits claimed to exist therein. The evidence is not such as to convince the Department that the "Blue Jay" location has ever been held or worked in good faith as a mining claim. The situation respecting the alleged "Golden Scepter" claim is no better. This location does not appear to rest upon any valid discovery of mineral, and the evidence fails to show that there has at any time been any serious effort to develop mineral upon it.

This case is materially different from *Michie v. Gothberg* (30 L. D., 407), cited by counsel for the appellant. In that case the mineral location interposed by protest against the application to purchase under the act of June 3, 1878, was based upon an actual discovery of mineral sufficient to sustain it until reasonable opportunity had been afforded the locator to ascertain by further development the extent and value of the mineral deposit he had discovered. As the time intervening between the date of the location and the filing of the application to purchase was less than three months (November 8, 1899, to January 22, 1900), it was found that reasonable opportunity for the development of the mineral actually discovered and located had not been given, and upon those facts, without undertaking to lay down a rule applicable to all cases, the Department held the location to be a mining claim within the meaning of the statute, and sustained the protest. Such are not the facts in the present case, as has been shown, and the locations here in question are not within the principle of the case cited.

As to the mining improvements alleged to have been made upon the land, the facts are sufficiently stated in your office decision, and the Department concurs in your conclusion respecting the same. Upon the whole record no error prejudicial to the appellant is found in said decision, and the same is hereby affirmed.

PURTLÉ v. STEFFÉE.

Motion for review of departmental decision of October 30, 1901, 31 L. D., 400, denied by Acting Secretary Ryan August 2, 1902.

HOMESTEAD ENTRY—CITIZENSHIP—HEIRS—EQUITABLE ACTION.

JOHN WULLICH.

Where a homestead entryman who has declared his intention of becoming a citizen dies, after the submission of final proof, without having been admitted to citizenship, but having complied with the law in all other respects except as to the submission of proof within the statutory period, the entry may be equitably confirmed for the benefit of the heirs who are citizens and patent issue in their names.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office, August 19, 1902.* (E. F. B.)

March 4, 1901, John Wullich, guardian of Herman Wullich, an insane person, submitted final proof upon the homestead entry of the said Herman Wullich, made October 24, 1891, for the NE. $\frac{1}{4}$, Sec. 22, T. 13 N., R. 5 E., Oklahoma City, Oklahoma, and received final cer-

tificate therefor. By decision of November 29, 1901, you rejected said proof upon the ground that while the guardian furnished evidence of his own admission to citizenship he failed to furnish evidence of the naturalization of the entryman, citing as authority the case of *Fette v. Christiansen* (29 L. D., 710).

You directed the local officers to notify John Wullich or any other known party in interest, that he will be allowed sixty days in which to furnish said proof, and upon failure to comply within the specified time the entry will be canceled without further notice.

John Wullich filed a motion for review of said decision, alleging error in said ruling and also alleging error in not finding that the entryman died on or about March 18, 1901, without regaining his sanity. The motion for review was verified by the affidavit of John Wullich, who stated that Herman Wullich became insane about nine months prior to March 4, 1901, and continued insane and an inmate of the Territorial Insane Asylum of Oklahoma until March 18, 1901, when he died in said asylum.

You adhered to your former ruling and refused to consider the second allegation of error for the reason that your office had not been apprised of the death of the entryman and, hence, made no error in not finding that he was dead. John Wullich, guardian, has appealed.

The entry was made by Herman Wullich, an alien, October 24, 1891, after having declared his intention to become a citizen of the United States. Final proof was not submitted upon said entry within the time required by the homestead law, but on March 4, 1901, John Wullich, a brother of the entryman and the duly appointed guardian of Herman Wullich, who had become insane, submitted final proof, which shows that the entryman established his residence on the tract in January, 1892, and continuously resided thereon until some time in 1900 when he became insane; that he cultivated twenty-five acres and raised crops thereon nine seasons; that he improved the place by a log house of the value of \$150.

While the final proof submitted during the lifetime of the entryman, and for his benefit, was properly rejected under authority of *Fette v. Christiansen*, *supra*, and while no proof of the death of the entryman had been presented at the time your decision of November 29, 1901, was rendered, his death was suggested by the motion for review and evidence of the same was furnished by the affidavit of John Wullich, and a statement of the Superintendent of the Insane Asylum to the same effect was also submitted.

If the entryman is dead, as alleged in the motion for review, the reason for rejecting the final proof upon an entry made for the benefit of an alien entryman no longer exists, if the beneficiaries of the entry, who now take under section 2291, Revised Statutes, are shown to be citizens and qualified to receive and hold the patent for said land. The

entryman having died without being admitted to citizenship, but having, so far as now appears from the record, complied with the law in all other respects save as to the submission of proof within the statutory period, the entry may be equitably confirmed for the benefit of the heirs who are citizens of the United States and patent issue in their names. Elizabeth Richter (25 L. D., 1).

It is not intended by this to determine who are the beneficiaries of said entry or whether sufficient proof of the death of the entryman has been furnished. The case is remanded to your office for readjudication in accordance with the views herein announced. In accordance with the ruling in the case last cited, you will cancel the final certificate issued in the name of Herman Wullich and direct that final certificate be issued in the name of the heirs, upon the proof submitted, as it may be accepted as though it was submitted by or in behalf of the legal heirs of said entryman.

Your decision is modified accordingly.

RIGHT OF WAY—TOLL ROAD—SECTION 2477, REVISED STATUTES.

THE PASADENA AND MT. WILSON TOLL ROAD CO. ET AL. *v.* SCHNEIDER.

A toll road is a highway within the meaning of section 2477 of the Revised Statutes. The reservation of a right of way claimed under section 2477 of the Revised Statutes, in a patent issued for lands traversed thereby, is not necessary to the protection of such right.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) *September 6, 1902.* (J. R. W.)

The Pasadena and Mt. Wilson Toll Road Company and The Precipice Canyon Water Company have appealed from your office decision of March 31, 1902, approving final proof under George A. Schneider's homestead entry for the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and Lots 1 and 2 of Sec. 6, T. 1 N., R. 11 W., S. B. M., Los Angeles, California, and rejecting the protest of appellants against issue of patent therefor.

April 21, 1900, Schneider made entry of the land, then in the San Gabriel forest reserve, established by executive proclamation of December 20, 1892 (27 Stat., 1049), showing that he began settlement March 4, 1891, which he had continuously maintained, the land being then unsurveyed, and the plat not being transmitted to the local office until March, 1900. Final proof was taken at the local office June 14, 1900, and on the same day the Precipice Canyon Water Company filed a protest against the acceptance of the final proof, and the Pasadena and Mt. Wilson Toll Road Company filed a petition praying that any patent issued upon the entry may be subject to the easement of that company's right of way. There was a hearing at the local office, in

which all parties participated, and on October 7, 1900, the local officers found in favor of Schneider, and recommended the acceptance of his final proof, and also found that—

The Pasadena and Mount Wilson Toll Road Company, a corporation organized under the laws of the State of California for the purpose of constructing, maintaining and operating pack trails and wagon roads, by authority of the Board of Supervisors of Los Angeles County, laid out a proposed road and filed a map with said Board of Supervisors March 25, 1890, showing the general course of said road, and on August 29, 1891, filed a map with the County Clerk of Los Angeles County showing the road as definitely located and constructed and approved by the Board of Supervisors of said county. Both of these maps show the road or trail as passing through the SW. $\frac{1}{4}$ of Section 6, the land in question; the latter map shows the trail as constructed to be *substantially* located upon said land as shown upon the map of proposed route filed March 25, 1890. From the testimony it would appear that the road or trail was constructed across the land in question prior to the settlement of Schneider. The trail is used by parties going to different places of resort in the mountains . . . and is . . . of importance both to the traveling public and to the government in the proper patrolling of the reserve.

The local office recommended that the patent issue subject to the right of way of the Pasadena and Mt. Wilson Toll Road Company.

The Precipice Canyon Water Company asserted no adverse right in the premises, but was in the position of an *amicus curiae*, and appealed as a protestant against the acceptance of the final proof. Your office decision found that Schneider had in good faith complied with the law, but further found that the Pasadena and Mt. Wilson Toll Road Company was not within the provisions of R. S. 2477 and had not shown proper user of its corporate franchise under the laws of California, and could not assert a claim of easement to the land and that Schneider's homestead entry should be advanced to patent without reference to or saving of its right of easement for right of way. The protestants appealed to the Department. Schneider has moved to dismiss the appeal because not taken in time, and because the Pasadena and Mt. Wilson Toll Road Company took no appeal from the decision of the local office. No appeal was necessary by that company from the local office, as the decision was in its favor so far as its interests were involved. The appeal was in time, as it was filed within seventy days from the date of your office decision, which directed the local office to notify the parties. The motion is therefore denied.

Upon the merits of Schneider's final proof the record amply supports the concurring findings of the local office and of your office of the *bona fides* of his entry and of his compliance with the requirements of the homestead law.

As to the rights of the Pasadena and Mt. Wilson Toll Road Company, it appears that the company is a corporation organized under the laws of California "to construct, maintain and operate pack trails and wagon roads and to charge and collect tolls for passengers, animals and vehicles passing thereon." May 15, 1890, the proper county

authorities, by ordinance, approved the map of location of its proposed road and granted to it a franchise—

to construct and maintain for a period of fifty years a toll and wagon road, and for the period of two years to first construct on the line of its proposed toll road a pack trail, for the accommodation of pack trains and horsemen, and the said Pasadena and Mount Wilson Toll Road Company is granted the right to collect tolls on said wagon road and pack trail . . . with all the rights and privileges and subject to all the conditions and restrictions contained in Title V, Part IV, Division 1 of the Civil Code, and Chapter III, Title VI, Part III of the Political Code.

While this clearly contemplated that ultimately and within two years a road, something more than a pack trail, should be built, the franchise vested *in presenti* a right to locate, construct and maintain a pack trail, which was constructed before Schneider's settlement, and is being maintained and operated. Such franchise and way, when made, are property, and may be used and held until, at instance of the public, by proceedings of *quo warranto* by the public prosecutor, or other proper proceeding, a forfeiture of the franchise is declared.

Section 2477 of the Revised Statutes grants "the right of way for the construction of highways over the public lands not reserved for public uses." A highway is "a road over which the public at large have a right of passage" (Dic. Loc. V.) and includes "every thoroughfare which is used by the public, and is, in the language of the English books, 'common to all the King's subjects'" (3 Kent. Com., 432). Toll roads are highways, and differ from ordinary highways merely in the fact that they are also subjects of property and the cost of their construction and maintenance is raised by a toll from those using them, instead of by general taxation, *Commonwealth v. Wilkinson* (16 Pick., Mass., 175, 26 Am. Dec., 654); *Buncombe Turnpike Co. v. Baxter* (10 Ired., N. Car., 222). The obstruction of a turnpike toll road is indictable, under a statute against obstruction of highways. (*Nor. Cent. R. Co. v. Commonwealth*, 90 Pa. St., 300.) A highway may be a mere footway. (*Tyler v. Sturdy*, 108 Mass., 196.) Neither the breadth, form, degree of facility, manner of construction, private, corporate, or public ownership, or source or manner of raising the fund for construction and maintenance, distinguishes a highway, but the fact of general public right of user for passage, without individual discrimination, is the essential feature. The necessities and volume of traffic, difficulties of route, and fund available for construction and maintenance, will vary the unessential features, but the fact of general public right of user for passage upon equal terms under like circumstances is the one constant characteristic of a highway.

The grant of right of way by Section 2477, R. S., is not restricted to those which permit passage of broad, or of wheeled, vehicles, or yet to highways made, owned, or maintained by the public. Highways are the means of communication and of commerce. The more difficult

and rugged is the country, the greater is their necessity and the more reason exists to encourage and aid their construction. A toll road is within the benefits of the section. (*Wason Toll Road Co. v. Creede Townsite*, 21 L. D., 351; 22 L. D., 145.)

That part of your office decision holding otherwise is not approved.

In *Dunlap v. Shingle Springs & Placerville R. R. Co.* (23 L. D., 67), after the decision in *Wason Toll Road v. Creede*, *supra*, it was held that no reservation in a patent is necessary to protect the easement of right of way granted by the general act of March 3, 1875 (18 Stat., 482); also *Denver & Rio Grande R. R. Co. v. Clack* (29 L. D., 478). The circular of November 27, 1896 (23 L. D., 458), directed that such reservation be omitted in such cases and in those of canal rights of way under the act of March 3, 1891 (26 Stat., 1095). Section 2477, R. S., is a general statute. By parity of reasoning the same rule applies, and no reservation of an easement claimed thereunder is necessary. The denial of such reservation in the patent to be issued to Schneider is for that reason affirmed.

TIMBER AND STONE APPLICATION—MINING CLAIM.

THE MANNERS CONSTRUCTION CO. *v.* REES.

Lands as to which any *bona fide* claim is asserted under any law of the United States other than the act of June 3, 1878, or upon which there is situated any mining claim, or which contain mining or other improvements, except for ditch or canal purposes, save such as were made by or belong to the applicant, are not subject to sale or purchase under said act.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office, September 12, 1902.* (A. B. P.)

March 29, 1901, Joseph R. Rees filed application to purchase, under the act of June 3, 1878 (20 Stat., 89), amended by the act of August 4, 1892 (27 Stat., 348), the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ Sec. 11, T. 21 S., R. 66 W., Pueblo, Colorado. Subsequently he gave the usual notice that he would submit proof before the local officers in support of his application, June 25, 1901.

June 24, 1901, The Manners Construction Company filed a corroborated protest against the application of Rees, alleging, in substance, that the lands applied for were located under the placer mining laws, March 16, 1900, as the Pueblo Stone placer claim; that the protestant company is the owner of said claim by purchase from the locators thereof; that since the date of said location the company and its grantors have been in the exclusive possession of the lands embraced therein, and, long prior to the filing by Rees of his application to purchase, had opened, developed and operated valuable quarries of building stone on said lands; that at all times since said location was made the

company and its grantors have been operating said quarries and marketing building stone therefrom, and have expended in work and labor upon the same from \$400.00 to \$500.00; that the lands are not lawfully subject to disposal under the statute upon which Rees's application is based, because at the time of the filing of said application, they were covered by a valid and subsisting mining claim (the Pueblo stone placer), were in the possession of the protestant company under said mining claim, and contained mining improvements made by said company consisting of the aforesaid developed quarries of valuable building stone, and facilities for quarrying the same. August 1, 1900, an amended protest was filed by said company, alleging, among other things not material to be here mentioned, in substance, that Rees's application to purchase was not filed in good faith for his own use and benefit, but for the use and benefit of one C. C. Sullivan.

On the day named in his notice (June 25, 1901) Rees appeared and submitted proof in support of his application to purchase. He also tendered the purchase price of the lands applied for, and the usual land office fees. July 6, 1901, he filed a motion to dismiss the protest of June 24, 1901, as insufficient to justify a hearing. This motion was sustained by the local officers August 7, 1901, and said protest was dismissed, as was also the one filed August 1, 1901. The Manners Construction Company thereupon appealed.

By decision of April 21, 1901, the action below was affirmed. From that decision the company has appealed to the Department.

It appears that the land in controversy was formerly embraced in the homestead entry of one William C. Currence, made March 1, 1893. That entry was canceled by your office March 7, 1901, as the result of a contest instituted March 8, 1900, by Rees, the applicant here. It also appears that on April 5, 1900, Charles J. Manners, predecessor in interest of the Manners Construction Company, filed a protest against said homestead entry wherein he alleged substantially the same matters with respect to the character and condition of the lands as are set up in the company's aforesaid protest of June 24, 1901. The entry having been canceled upon the contest of Rees, no action upon the Manners protest was taken.

The decision of your office, as well as that of the local officers, is based upon the theory that upon the record facts the priority of right is in Rees because as successful contestant of the homestead entry of Currence he was entitled, under section 2 of the act of May 14, 1880 (21 Stat., 140), amended by the act of July 26, 1892 (27 Stat., 270), to thirty days from notice of the cancellation of such entry, to enter the lands, within which time he filed his present application to purchase. The section referred to, in so far as need be here stated, is as follows:

In all cases where any person has contested, paid the land-office fees, and procured the cancellation of any pre-emption, homestead, or timber-culture entry, he

shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands.

The Department is of opinion that the act referred to has no application to a case like the present one.

The statute upon which Rees's application to purchase is predicated provides:

That nothing herein contained shall defeat or impair any *bona fide* claim under any law of the United States, or authorize the sale of any mining claim.

It is further provided that the applicant shall make oath, among other things, that the land applied for—

contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belonged to the applicant.

It thus appears that lands as to which any *bona fide* adverse claim is asserted under *any law* of the United States, or upon which there is situated any mining claim, or which contain any mining or other improvements, except for ditch or canal purposes, save such as were made by or belong to the applicant, are not subject to sale or purchase under the statute upon which Rees bases his claimed right of purchase.

The protest of the Manners Construction Company alleges, in effect, that prior to and at the time of the filing of Rees's application to purchase, the lands applied for were embraced in a valid subsisting mining location, and have been at all times since said location was made, and under and by virtue thereof, in the possession of the protestant and its grantees who have opened and developed valuable quarries of building stone within the location, and have expended from \$400.00 to \$500.00 in mining improvements upon the lands. If these allegations be true the lands are not subject to sale to and can not be purchased by Rees under the act of June 3, 1878. The fact that when the alleged mining claim was located the homestead entry of Currence was still of record and uncanceled, did not of itself affect the validity of the location. No vested right to the lands had attached under the entry, and until such right should attach the lands belong to the United States and if mineral in character are subject to location and purchase under the mining laws.

The Department is therefore of the opinion that the protest of the Manners Construction Company is amply sufficient to justify a hearing, and your office decision dismissing the same is accordingly reversed. A hearing will be had upon the protest, and will embrace also an inquiry into the charge of the amended protest that Rees's application was made not for his own exclusive use and benefit, but for the benefit of another. Upon the record of the hearing the case will be adjudicated in accordance with the facts and the law applicable thereto.

RIGHT OF WAY—RAILROAD—ACT OF MARCH 3, 1875.

THE RIO GRANDE RAILROAD CO. *v.* THE CRYSTAL RIVER RAILROAD CO.

In case of conflicting applications for right of way for a railroad through a canyon, pass, or defile, under the act of March 3, 1875, the Department will approve the maps of location filed by each company, if regular, without regard to any question of priority, and leave to the courts, in the event it becomes necessary, any determination as to the rights of the companies under their respective applications.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) *September 18, 1902.* (F. W. C.)

The Department has again considered the appeal of the Rio Grande Railroad Company from your office decision of February 8th last, according to the Crystal River Railroad Company priority in the matter of the conflicting applications by these companies for right of way under the provisions of the act of March 3, 1875 (18 Stat., 482).

The maps of location in question were filed in the local land office only a few days apart and cover practically the same location from a point beginning at the junction of the Muddy and Anthracite creeks where they form the north fork of the Gunnison river in unsurveyed township 13 south, range 89 west, thence westerly down the north bank of that river to a point in township 13 south, range 91 west. From the certificates attached to the maps and the showing which accompanied them and has since been filed it appears that the Rio Grande company was the first to begin actual survey of the portion of its line here in conflict, and that the Crystal River Railroad Company first adopted a survey of its line in this vicinity and first filed in the local land office its map of location. It was because of the latter fact that your office accorded to the Crystal River Railroad Company priority, but because of irregularities and mistakes in the maps of location and the field notes of survey, your office does not recommend the approval of the maps filed by either company.

In your said office decision appealed from it was stated that the Gunnison river, along the north bank of which the locations in question are made, runs in a deep narrow gorge of the character referred to in the second section of the act of March 3, 1875, *supra*, under which these applications are filed. By said section it is provided:

That any railroad company whose right of way, or whose track or road-bed upon such right of way, passes through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right of way through any canyon, pass or defile, shall not cause the disuse of any wagon or other public highway located therein, nor prevent the location through the same of any such

wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road: *Provided*, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile.

By departmental order of June 4th last, these companies were allowed thirty days from date of your office letter so notifying them, within which to make any showing desired bearing upon the finding by your office that the portion of the road in question passes through a "canyon, pass, or defile," within the meaning of those terms as used in section two of the act of 1875.

The Crystal River company has made no showing under this order, but in affidavits bearing on the character of its survey preceding the filing of its map of location, the line of road is referred to as located in a canyon. The Rio Grande company has filed affidavits which tend to sustain the finding made by your office.

Under this section a right of way acquired on a line of road located and constructed within a canyon, pass, or defile, does not prevent any other railroad company from occupying and using said canyon, pass, or defile. Said section further provides that the expense incident to the construction and operation of the railroad where the same line is to be used by more than one company, shall be equitably divided between all the companies.

From the showing which has been filed under departmental order of June 4th last, considered in connection with the fact that the lines of location through this canyon are practically identical, it is clear that the location applied for is the only feasible, or at any rate the best, location for a railroad in this canyon. To the end, therefore, that these companies may have proper standing, in the event it is necessary to resort to the courts to determine their rights in the matter of the construction of the road, it is the opinion of this Department, without consideration of any question of priority, that both maps of location should be approved when corrected in the matters referred to in your office decision.

TIMBER CUTTING—ACT OF JULY 1, 1898.

INSTRUCTIONS.

The act of July 1, 1898, conferred upon residents of the State of Idaho the same right to cut and remove timber from lands within the limits prescribed by said act, in the State of Wyoming, whether reserved or unreserved, as was enjoyed by the residents of Wyoming under the acts of March 3, 1891, and June 4, 1897.

Acting Secretary Campbell to the Commissioner of the General Land
(S. V. P.) *Office, September 19, 1902.* (E. F. B.)

The Department is in receipt of your letter of August 15, 1902, requesting to be advised whether it is permissible for the citizens of Wyoming and Idaho to cut and remove timber situated within forest reserves in the State of Wyoming within the limits prescribed by the act of July 1, 1898 (30 Stat., 597, 618), and to remove the timber so cut into the State of Idaho for domestic uses.

The act of July 1, 1898, *supra*, is an amendment of section eight of the act of March 3, 1891 (26 Stat., 1095), as amended by the substitute for said section, approved the same day (26 Stat., 1093). The portion of said section relative to the matter now under consideration reads as follows:

And in the States of Colorado, Montana, Idaho, North Dakota and South Dakota, Wyoming, and the District of Alaska, and the gold and silver regions of Nevada and the Territory of Utah, in any criminal prosecution or civil action by the United States for a trespass on such public timber lands or to recover timber or lumber cut thereon, it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes under rules and regulations made and prescribed by the Secretary of the Interior, and has not been transported out of the same; but nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain: *Provided*, That the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act, and he may designate the sections or tracts of land where timber may be cut, and it shall not be lawful to cut or remove any timber except as may be prescribed by such rules and regulations; but this act shall not operate to repeal the act of June third, eighteen hundred and seventy-eight, providing for cutting of timber on mineral lands.

The scope and purpose of the act was to authorize the Secretary of the Interior to permit the cutting of timber for agricultural, mining, manufacturing or domestic purposes from the unreserved non-mineral public lands of the United States under such rules and regulations as he might prescribe, in order that settlers upon the public lands and other residents within the States and Territories named in the act, might procure timber from the public lands under authority of law to supply their immediate wants for the purposes above stated. While it would not be unlawful to cut and remove timber from the unreserved non-mineral lands, under the provisions of said act, without obtaining a permit, if such timber is used in the State or Territory in which the timber is cut, the exercise of the privilege granted is restrained by the provision authorizing the Secretary of the Interior to designate the sections or tracts of land from which such timber may be cut, so that the permission given by the act is at all times subject to supervision by the Department, which may restrain or prohibit such cutting if deemed necessary. Under the terms of the act the

timber cut and removed must be confined strictly to use in the State or Territory in which it is taken and can not be exported therefrom into any other State or Territory. See regulations February 10, 1900 (29 L. D., 572).

By the 24th section of the same act the President was authorized to set apart public lands bearing forests, for public reservations, and under the provisions of said section lands have from time to time been set apart and reserved, which withdrew them from the operation of the 8th section of the act, but by the act of June 4, 1897 (30 Stat., 11, 35), the following provision was made with reference to the use of timber on said reservations:

The Secretary of the Interior may permit under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by *bona fide* settlers, miners, residents, and prospectors for minerals, for fire-wood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used in the State or Territory, respectively, where such reservation may be located.

It will be seen that substantially the same right and privilege granted to settlers and residents by the act of 1891 to use the timber upon the public lands for domestic purposes, was extended by the act of June 4, 1897, to forest reservations, by authorizing the Secretary of the Interior under regulations to be prescribed by him to permit the cutting of timber from such reservations by *bona fide* settlers and residents, for domestic purposes, upon the same condition, to wit, that it shall be used in the State or Territory where the reservation from which the timber is cut may be located.

The timber in the State of Wyoming on the west slope of the continental divide along the Snake River and its tributaries is the natural and only source from which the citizens of the State of Idaho living in the valleys west of said ridge can procure timber for the uses and purposes contemplated by the eighth section of the act of March 3, 1891. Being restrained from taking timber from said lands because of the provision restricting the use of it to the State or Territory in which the timber is cut, such citizens were practically excluded from the benefits of the act, and in order that its benefits might be enjoyed by them it was amended by the act of July 1, 1898, *supra*, which provided:

That it shall be lawful for the Secretary of the Interior to grant permits under the provisions of the 8th section of the act March 3, 1891, to citizens of Idaho and Wyoming to cut timber in the State of Wyoming west of the Continental Divide on the Snake River and its tributaries to the boundary line of Idaho, for agricultural, mining, or other domestic purposes, and to remove the timber so cut to the State of Idaho.

The practical effect of the act as amended is to permit timber to be cut and removed from lands within the prescribed limits, and to be

removed to the State of Idaho, for the use of the residents of that State, to the same extent as if the timber had been cut within the limits of said State. It extends to residents of the State of Idaho the same privilege to cut and remove timber from lands within the prescribed limits for their use as was enjoyed by the residents of the State of Wyoming at the date of said act of July 1, 1898. From the date of the passage of that act timber cut upon lands within said limits for use in the State of Idaho is to all intents and purposes timber cut in the State of Idaho.

These several acts must be construed *in pari materia*, and such effect must be given to the act of June 4, 1897, as if the act of July 1, 1898, was in terms incorporated therein. No other construction can be given to said acts without violating the clear intent and purpose of the act of July 1, 1898, which was evidently intended to confer upon residents of Idaho the same right to cut and remove timber from lands within the described limits, whether reserved or unreserved, as was then enjoyed by the residents of Wyoming under the acts of March 3, 1891, and June 4, 1897, while it did not withdraw from citizens of Wyoming any rights they then possessed under said acts. You are therefore advised that citizens of the State of Idaho may be permitted under authority of the act of June 4, 1897, and the regulations issued thereunder, to cut timber from forest reserves in the State of Wyoming within the limits designated by the act of July 1, 1898, and to remove the timber so cut to the State of Idaho for domestic uses.

MINING CLAIM—NOTICE—ENTRY.

SOUTHERN CROSS GOLD MINING CO. v. SEXTON ET AL.

There can be no valid entry upon an application for patent to a mining claim until notice of the application shall have been lawfully given.

An adjudication by the land department that the notice of application for patent to a mining claim is fatally defective is equivalent to a determination that an entry based upon such application is illegal and should be canceled. In such case the entry will be treated as though formally canceled as of the date the notice was finally adjudicated to be insufficient.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) *September 21, 1901.* (A. B. P.)

April 21, 1885, William Sexton *et al.* made entry No. 1027, Sacramento land district, California, for the Cape Horn quartz mining claim, embracing two locations known, respectively, as the Cape Horn and the Poole locations. Upon an examination of the record of the entry by your office (which, for some unexplained reason, was not made until July 23, 1895), it was found that no connecting line

between the claim and the public survey, or a United States mineral monument, had been given in the notice of the application for patent upon which the entry was based, and for that reason the applicants were required to give new notice of their application for patent in the manner prescribed by law and the official regulations. An amended survey of the claim was also required to cover certain defects found in the original survey. A motion for review, subsequently filed by the applicants, was denied by your office by decision of December 11, 1896.

New notice of the application for patent, based upon an amended survey made as required, was accordingly published and posted, the publication commencing December 14, 1900. An adverse claim was filed by the Southern Cross Gold Mining Company. Possessory title to the land embraced in the claim applied for was asserted by said company as locator of two claims known, respectively, as the Trimble and Old Harlow. A stay of the patent proceedings, as provided by section 2326 of the Revised Statutes, was thereupon recognized by the local officers. Suit upon the adverse claim was timely instituted in the local court, and the suit is still pending and undetermined.

March 25, 1901, the applicants for patent filed a motion asking that the adverse claim be dismissed and that their original entry, which appears never to have been formally canceled, be passed to patent. It is contended in the motion, in substance, (1) that the adverse claim and the proceedings thereon in court are insufficient as a basis for the suspension of further proceedings upon the application for patent in view of the republication and reposting of notice thereof by the applicants as required, and of the existing entry allowed upon their original publication and posting, and (2) that the adverse claim is irregular and insufficient in that it does not properly show the nature, boundaries, and extent of the claim therein asserted. By decision of April 18, 1901, your office overruled the motion to dismiss. The applicants have appealed to the Department.

The errors assigned in the appeal present substantially the same questions raised by the motion to dismiss. Much stress is laid upon the fact that the original Cape Horn entry still remains of record. It is strenuously contended, in view thereof, that the land in question was not subject to the Trimble and Harlow locations, which appear to have been made after the date of said entry, and that the application for patent, upon the new notice, is therefore not subject to adverse claim under the statute on behalf of said locations.

This contention can not be sustained. Its infirmity lies in the fact that the original notice of the application for patent was fatally defective and formed no legal basis for the entry made upon it. When this condition was found to exist the regular course would have been to have canceled the entry before allowing new notice to be

given. The case was not one of mere irregularity, or one which presented defects that might be cured by supplemental proceedings irrespective of any claim or contention by other persons, and the entry suspended until the supplemental proceedings could be had. The original notice being fatally defective, it was rejected for that reason. Under the law, when the notice fell the entry fell also. It no longer had any basis to support it. It must be treated, therefore, as though it had been canceled of record at the time the notice was finally adjudicated to be insufficient. The adjudication of the insufficiency of the notice was equivalent to a determination that the entry had been erroneously allowed and should be canceled. There can be no valid entry upon an application for patent to a mining claim until notice of the application shall have been lawfully given.

There does not appear to be any reasonable ground for the contention that the adverse claim is insufficient in form or substance. Suit thereon has been entertained by the court and the subject matter of the controversy has thus been transferred to that tribunal for adjudication. The land department must await the result of the court proceedings before taking further action.

There is no error in your office decision of which the appellant has any right to complain, and said decision, in so far as the questions presented by the appeal are concerned, is affirmed.

INDIAN HOMESTEAD—ALLOTMENT—SEC. 4, ACT OF FEBRUARY 8, 1887.

OPINION.

Indian wives of Indians who have entered lands under the provisions of the homestead laws, are not entitled to allotments under the fourth section of the act of February 8, 1887, whether the marriage took place prior or subsequent to the act of August 9, 1888.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, June 28, 1902. (C. J. G.)

The Commissioner of Indian Affairs, under date of April 5, 1902, submits a request—referred to me for an opinion on the subject-matter involved—to be advised whether or not the Indian wives of Indians who have entered land under the homestead law are entitled to allotments under section 4 of the act of February 8, 1887 (24 Stats., 388), if married prior to the passage of the act of August 9, 1888 (25 Stats., 392).

This request arises from an interpretation placed by the Indian Office upon an opinion rendered by the Assistant Attorney-General for the Interior Department, April 8, 1896, in the case of Sarah Hale, wherein it was said "that an Indian woman who married a citizen of

the United States since August 9, 1888, is not entitled to an allotment under the fourth section of the act of February 8, 1887," it being concluded by the Indian Office that the inference to be drawn from this language is, that an Indian woman so married *prior* to August 9, 1888, *is* entitled to an allotment. Attention is likewise invited by that office to the conflict that would necessarily arise between the result of such an inference, and the case of Boston Pete, wherein the Department stated, January 3, 1902 (Ind. Div.), that, "as Boston Pete became a citizen on taking a homestead, his wife, if living with him, apart from her tribe, also became a citizen by the act of February 8, 1887, and is not entitled to an allotment under the fourth section of said act," no reference being made to the act of August 9, 1888.

The act of March 3, 1875 (18 Stat., 402, 420), extended the benefits of the homestead law to

any Indian born in the United States, who is the head of a family, or who has arrived at the age of twenty-one years, and who has abandoned, or may hereafter abandon, his tribal relations.

By the act of July 4, 1884 (23 Stats., 96), the same privilege was further extended as follows:

That such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter so locate, may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States.

In the case of *Delorme v. Cordeau* (29 L. D., 277), it was held (syllabus):

The word "located," as used in the act of July 4, 1884, is employed in the sense of *settlement*, and refers to a settler who is living on the land.

The fourth section of the act of February 8, 1887 (24 Stat., 388), is, in part, as follows:

That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations.

The benefits and privileges conferred by these acts are upon Indians as such, and those contemplated are Indians who locate and settle upon the public land or those not living upon a reservation. Each act imports and necessarily involves as a prerequisite to the enjoyment of its benefits, a separation from the tribe. This being true, it necessarily follows that all who have received the benefit of any one of said provisions of law are equally within the terms of the sixth section of said act of February 8, 1887, which provides:

And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law

or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens.

This section embraces not only Indians who may have taken homesteads or received allotments, but also all others who have withdrawn from their tribes and adopted the habits of civilized life.

Separation or living apart from their tribes for the purpose of a settlement upon the public lands to secure a homestead or an allotment, is a necessary part of the procedure under the laws authorizing the acquirement of public lands by Indians. The withdrawal from her tribe by an Indian woman for the purpose of assuming or continuing marriage relations with a citizen of the United States, brings her within the sixth section of the act of 1887. It is immaterial whether such citizen husband be an Indian by blood or a member of some other race, and the process by which he was made a citizen is likewise immaterial.

The second section of the act of August 9, 1888, *supra*, provides:

That every Indian woman . . . who may hereafter be married to any citizen of the United States, is hereby declared to become by such marriage a citizen of the United States, with all the rights, privileges, and immunities of any such citizen, being a married woman: *Provided*, That nothing in this act contained shall impair or in any way affect the right or title of such married woman to any tribal property or any interest therein.

The property rights protected thereby are those relating to tribal property and not those arising under the fourth section of the act of 1887 in respect of allotments out of the public domain. The law as it stood at the date of said act of 1888 made an Indian separating from the tribe a citizen of the United States, and the declaration in said act that an Indian woman marrying a citizen of the United States should thereby become a citizen, did not affect her status under the then-existing law. That declaration does not necessarily imply that a different rule prevailed before. The rule of construction in such cases is stated in *Black on Interpretation of Laws* (sec. 90), as follows:

But the enactment of a specific provision on a given subject does not, of itself, prove that the law on that subject was different before; for such enactment may have been in affirmance of existing law, and to remove doubts.

While the inference drawn by the Indian Office from the opinions given in the case of Sarah Hale may be properly deduced from the language used, yet it is merely an inference. The question as to the rights or status of Indian women married prior to the act of 1888 was not involved in that case and hence any expression used there which may by inference be said to indicate an opinion thereon is not to be regarded as settling that question.

For the reasons given herein I am of opinion, and so advise you, that Indian wives of Indians who have entered lands under the provisions of the homestead laws, are not entitled to allotments under the fourth section of the act of February 8, 1887, whether the marriage took place prior to or since August 9, 1888. .

Approved:

E. A. HITCHCOCK, *Secretary*.

ENTRIES ON LANDS WITHDRAWN FOR THE CONSTRUCTION OF IRRIGATION WORKS FOR THE RECLAMATION OF ARID LANDS—ACT OF JUNE 17, 1902.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *September 9, 1902.*

REGISTERS AND RECEIVERS,

*United States land offices in Arizona, California,
Colorado, Idaho, Kansas, Montana, Nebraska, Nevada,
New Mexico, North Dakota, Oklahoma, Oregon,
South Dakota, Utah, Washington, and Wyoming.*

GENTLEMEN: Your attention is called to the provisions of sections 3 and 4 of the act of Congress approved June 17, 1902 (32 Stat., 388), entitled:

An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands.

A copy of said act is attached hereto.

You will observe that lands withdrawn under the provisions of this act are subject to entry under the provisions of the homestead law only; that entries made on lands so withdrawn are subject to all the provisions, limitations, charges, terms, and conditions of the act; that not less than 40 nor more than 160 acres can be embraced in one entry; that such entries are not subject to the commutation provisions of the homestead law, and that, on the determination of the Secretary of the Interior that the proposed irrigation project is practicable, the entries may be reduced in area to the limit representing the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question, and will become subject to the charges per acre which may be determined upon, to be paid in annual installments not exceeding ten.

You will indorse across the face of each duplicate receipt, and also across the face of each homestead application, the following:

"This entry allowed subject to the provisions of the act of June 17, 1902 (Public, No. 161)."

Each entryman under this act should be advised of the provisions of the same by furnishing him with a copy of this circular.

Very respectfully,

W. A. RICHARDS,
Acting Commissioner.

Approved:

THOS. RYAN, *Acting Secretary.*

[32 Stat., 388.]

AN ACT appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all moneys received from the sale and disposal of public lands in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming, beginning with the fiscal year ending June thirtieth, nineteen hundred and one, including the surplus of fees and commissions in excess of allowances to registers and receivers, and excepting the five per centum of the proceeds of the sales of public lands in the above States set aside by law for educational and other purposes, shall be, and the same are hereby, reserved, set aside, and appropriated as a special fund in the Treasury to be known as the "reclamation fund," to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in the said States and Territories, and for the payment of all other expenditures provided for in this act: *Provided*, That in case the receipts from the sale and disposal of public lands other than those realized from the sale and disposal of lands referred to in this section are insufficient to meet the requirements for the support of agricultural colleges in the several States and Territories, under the act of August thirtieth, eighteen hundred and ninety, entitled "An act to apply a portion of the proceeds of the public lands to the more complete endowment and support of the colleges for the benefit of agriculture and the mechanic arts, established under the provisions of an act of Congress approved July second, eighteen hundred and sixty-two," the deficiency, if any, in the sum necessary for the support of the said colleges shall be provided for from any moneys in the Treasury not otherwise appropriated.

SEC. 2. That the Secretary of the Interior is hereby authorized and directed to make examinations and surveys for, and to locate and construct, as herein provided, irrigation works for the storage, diversion, and development of waters, including artesian wells, and to report to Congress at the beginning of each regular session as to the results of such examinations and surveys, giving estimates of cost of all contemplated works, the quantity and location of the lands which can be irrigated therefrom, and all facts relative to the practicability of each irrigation project; also the cost of works in process of construction as well as of those which have been completed.

SEC. 3. That the Secretary of the Interior shall, before giving the public notice provided for in section four of this act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation

from said works: *Provided*, That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this act; that said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or unadvisable he shall thereupon restore said lands to entry; that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided: *Provided*, That the commutation provisions of the homestead laws shall not apply to entries made under this act.

SEC. 4. That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: *Provided*, That in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon.

SEC. 5. That the entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the government the charges apportioned against such tract, as provided in section four. No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual *bona fide* resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this act, as well as of any moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund. Registers and receivers shall be allowed the usual commissions on all moneys paid for lands entered under this act.

SEC. 6. That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this act: *Provided*, That when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reser-

voirs and the works necessary for their protection and operation shall remain in the government until otherwise provided by Congress.

Sec. 7. That where in carrying out the provisions of this act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney-General of the United States upon every application of the Secretary of the Interior, under this act, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice.

Sec. 8. That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

Sec. 9. That it is hereby declared to be the duty of the Secretary of the Interior in carrying out the provisions of this act, so far as the same may be practicable and subject to the existence of feasible irrigation projects, to expend the major portion of the funds arising from the sale of public lands within each State and Territory hereinbefore named for the benefit of arid and semiarid lands within the limits of such State or Territory: *Provided*, That the Secretary may temporarily use such portion of said funds for the benefit of arid or semiarid lands in any particular State or Territory hereinbefore named as he may deem advisable, but when so used the excess shall be restored to the fund as soon as practicable, to the end that ultimately, and in any event, within each ten-year period after the passage of this act, the expenditures for the benefit of the said States and Territories shall be equalized according to the proportions and subject to the conditions as to practicability and feasibility aforesaid.

Sec. 10. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect.

Approved, June 17, 1902.

HOMESTEAD ENTRIES ON LANDS TEMPORARILY WITHDRAWN FOR
IRRIGATION PURPOSES—ACT OF JUNE 17, 1902.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *October 25, 1902.*

REGISTERS AND RECEIVERS,

*United States Land Offices in Arizona, California,
Colorado, Idaho, Kansas, Montana, Nebraska, Nevada,
New Mexico, North Dakota, Oklahoma, Oregon,
South Dakota, Utah, Washington, and Wyoming.*

GENTLEMEN: You are hereby directed, in addition to the instructions contained in office circular of September 9, 1902, to call the especial attention of all persons that have made, or are intending to make,

homestead entries on lands that have been, or may hereafter be, temporarily withdrawn for irrigation purposes, to the following statement:

The withdrawal of these lands is principally for the purpose of making surveys and irrigation investigations in order to determine the feasibility of the plans of irrigation and reclamation proposed. Only a portion of the lands will be irrigated even if the project is feasible. It will be impossible to decide in advance of careful examination what lands may be watered, if any. The mere fact that surveys are in progress is no indication whatever that the works will be built, and this fact can not determine how much water there may be available, or what lands can be covered, or whether the cost will be too great to justify the undertaking, until the surveys and the irrigation investigation have been completed.

Attention is also called to the fact that all entries made upon the lands referred to are subject to the following proviso of the act of August 30, 1890 (26 Stat., 391):

That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by the authority of the United States.

Under this provision of the law, should a homestead entry embrace land that is needed in whole or in part for a dam site, a reservoir, or a canal, the land would be taken for such purpose, and the entryman would have no claim against the United States for the taking of such right of way.

You will post a copy of this circular in a conspicuous place in your office and give the subject-matter hereof such general publicity as may be possible.

Very respectfully,

BINGER HERMANN,
Commissioner.

Approved, October 25, 1902:

E. A. HITCHCOCK, *Secretary.*

SETTLERS ON RAILROAD AND WAGON-ROAD GRANTS—ACTS OF JUNE 22,
1874, AUGUST 29, 1890, AND JULY 1, 1902.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *September 22, 1902.*

The act of June 22, 1874 [18 Stat., 194], reads as follows:

That in the adjustment of all railroad land grants, whether made directly to any railroad company or to any State for railroad purposes, if any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed

under the preemption or homestead laws of the United States subsequent to the time at which, by the decision of the Land Office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral, and within the limits of the grant, not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted. And any such entries or filings thus relieved from conflict may be perfected into complete title as if such lands had not been granted: *Provided*, That nothing herein contained shall in any manner be so construed as to enlarge or extend any grant to any such railroad, or to extend to lands reserved in any land grant made for railroad purposes: *And provided further*, That this act shall not be construed so as in any manner to confirm or legalize any decision or ruling of the Interior Department under which lands have been certified to any railroad company when such lands have been entered by a preemption or homestead settler after the location of the line of the road and prior to the notice to the local land office of the withdrawal of such lands from market.

By act of August 29, 1890 [26 Stat., 369], the act of June 22, 1874, was amended as follows:

That the privileges granted by the aforesaid act approved June twenty-second, eighteen hundred and seventy-four, are hereby extended (subject to the provisos, limitations, and restrictions thereof) to all persons entitled to the right of homestead or preemption under the laws of the United States, who have resided upon and improved for five years lands granted to any railroad company but whose entries or filings have not for any cause been admitted to record.

The following is the act of July 1, 1902 [32 Stat., 733]:

That the provision of the act of June twenty-second, eighteen hundred and seventy-four, entitled "An act for the relief of settlers on railroad lands," and all acts amendatory thereof or supplementary thereto, including the act approved March third, eighteen hundred and eighty-seven, entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," as modified or supplemented by the act approved March second, eighteen hundred and ninety-six, entitled "An act to provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes," shall apply to grants of land in aid of the construction of wagon roads.

The act of June 22, 1874, authorizes the relinquishment by railroad companies, in favor of settlers, of lands within the limits of their grants which have been entered or filed upon under the provisions of the preemption or homestead laws of the United States subsequent to the time at which, by decision of the Land Office, the rights of said roads have been declared to have attached, and to select in lieu of the land thus relinquished an equal quantity of other lands from any of the public lands within the limits of their grants, nonmineral in character, and not reserved or otherwise appropriated at the date of selection, and to receive title to the same as though originally granted.

As the act of June 22, 1874, limited the relief to persons who had been allowed to make entries, the act of August 29, 1890, extended the privileges granted thereby to persons who have resided upon and improved lands granted to any railroad company for five years, but

whose entries for any reason were not admitted of record, and the act of July 1, 1902, extended the provisions of said acts and the acts of March 3, 1887 (24 Stat., 556), which provided for the adjustment of railroad land grants and forfeited the lands then unearned by the construction of the roads, as modified and supplemented by the act of March 2, 1896 (29 Stat., 42), entitled "An act to provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes," to grants of land to aid in the construction of wagon roads.

Therefore, upon the filing of any relinquishment as prescribed in said acts this office is authorized to treat the filing, entry, or claim of the settler as though the land had not been granted to the railroad or wagon-road company.

Where conflicting claims are brought to the attention of this office and the superior right of the company has been ascertained, and it is found that the claim of the settler in the absence of the railroad claim would be allowed, this office will direct the attention of the officers of the company to the facts and request the relinquishment of the land.

At the same time the party interested should himself seek the relief indicated by direct application to the railroad or wagon-road authorities, as the case may be, and thereby aid in securing an early adjustment.

Where patent or its equivalent has not been issued for the benefit of the company, relinquishment may be made by simple waiver of claim; but where title has passed, formal reconveyance will be required, as in other cases of surrender of patents.

The company may file its lieu selection and relinquishment at the same time, or it may file its relinquishment and make its selection at any subsequent time, in which latter case the relinquishment may be sent direct to this office, and upon its receipt proper annotations thereof will be made on the records and the settler's claim immediately released from suspension. But selections of lieu lands must be filed with the register and receiver of the proper local land office and be noted upon their records before transmission to this office.

Selections must be of lands, not mineral, within the limits of the grant, free from other claims and not reserved or otherwise appropriated at date of selection, but the word "reserved," as here used, shall not be held to include the sections alternate to those granted, the title to which remains in the United States.

Where selection fees have been paid upon the land relinquished they will be applied to the lieu selection, but where such fees have not been paid the usual selection fees will be charged.

The selections will be reported by the register and receiver in the same manner as other selections, with a reference to the proper act or acts by their date and title; and opposite each tract selected annotation

will be made on the records of the tract surrendered. See Forms A and B attached.

It is to be noted that the acts authorizing relinquishments by railroad and wagon-road companies are not mandatory upon the companies, but simply provide a mode of adjustment of conflicting claims depending upon their voluntary action, and the settlers should therefore assist this office to the extent of their ability in securing the relinquishments sought.

For instructions under act of March 3, 1887, see circular of February 13, 1889, 8 L. D., 348.

Very respectfully,

BINGER HERMANN,
Commissioner.

Approved:

THOS. RYAN,
Acting Secretary of the Interior.

FORM A.

UNITED STATES LAND OFFICE,

_____,
_____, 1902.

I, _____, agent of the _____ Company, hereby apply to select the following-described lands, in lieu of lands inuring to said company under the act of _____, and surrendered by said company in favor of actual settlers thereon as provided by the act of _____, entitled "_____."

FORM B.

UNITED STATES LAND OFFICE,

_____,
_____, 1902.

We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the _____ Company in lieu of lands heretofore granted for said company and selected by its duly authorized agent, and that we find the same to be correct; and we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States and within the limits of _____ miles.

We further certify that the foregoing list shows an assessment of the fees payable to us under the act of July 1, 1864, and that the said company have paid to the undersigned, the receiver, the full sum of _____, in full payment of said fees.

_____, *Register.*
_____, *Receiver.*

MURRAY v. CHAPMAN.

Motion for review of departmental decision of December 12, 1901, 31 L. D., 169; denied by Acting Secretary Ryan October 6, 1902.

JACOBY *v.* KUBAL.

Motion for review of departmental decision of July 24, 1902, 31 L. D., 382, denied by Acting Secretary Ryan October 6, 1902.

HOMESTEAD—SOLDIERS' ADDITIONAL—SECTIONS 2304 AND 2306, R. S.

GEORGE W. COOK.

The qualifications of a soldier who makes application for an additional homestead under section 2306 of the Revised Statutes, must be determined under the limitations found in section 2304, which provides that the soldier shall have "served in the army of the United States during the recent rebellion, for ninety days."

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *October 23, 1902.* (C. J. G.)

A motion has been filed by George W. Cook, assignee of the claimed soldiers' additional homestead right of Alban E. Bentley, for review of departmental decision of August 26, 1902 (not reported), wherein is affirmed the action of your office in rejecting his application to enter, under section 2306 of the Revised Statutes, the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, sec. 17, T. 9 N., R. 19 E., Lewiston, Montana, land district.

The report furnished by the Record and Pension Office of the War Department as to the soldier's military service was as follows:

Alban Bentley was enrolled June 9, 1862, at Camp Chase for 3 mos., and mustered into service as a Pvt. in Co. E, 85 Reg't Ohio Inf., June 10, 1862, and dischg'd as a Pvt. Aug. 18, 1862, on surgeon's certificate of disability.

Name Alban E. Bentley not found on rolls of Co.

The basis of your office decision was that—as shown by the above report—the soldier served only two months and eight days in the army, and for that reason, under the decisions of the Department, he was not entitled to a soldiers' additional homestead right, although he was discharged on account of disability. In the case of Leslie M. Hamilton (31 L. D., 165, 166), it was said:

Section 2306 of the Revised Statutes is expressly limited to the particular class mentioned in section 2304, namely, those who have served in the Army, Navy, or Marine Corps of the United States during the war of the rebellion, for ninety days. The provisions in section 2305 of the Revised Statutes with respect to soldiers "discharged on account of wounds received or disability incurred in the line of duty," were made solely with respect to the credit that should be allowed a soldier for his military service in computing the period of his residence under an original entry, and in no way can be invoked as bearing upon the qualifications of an applicant under section 2306, whose status in that respect must be determined under limitations found in section 2304.

It is insisted in the motion for review, as was done upon appeal, that it was error to follow the decision in that case, as the statements

made therein, as above, were not necessary to its adjudication and are therefore mere *dicta*; that it was error to construe section 2306 of the Revised Statutes solely in relation to section 2304, which also should be construed in connection with section 2305; that in seeking a correct interpretation of the sections named resort should be had to the original act of June 8, 1872 (17 Stat., 333), as it stood prior to revision, and which it is alleged comprehends all classes of soldiers. The decision of your office in the case of Leslie M. Hamilton, *supra*, denying an application for the exercise of a soldiers' additional right, was on the ground that the soldier served less than ninety days during the war of the rebellion and was not discharged for disability incurred in the line of duty, "even if in that case he would be entitled to the additional right." This ruling called directly for a construction of section 2305 of the Revised Statutes—as to its relation to section 2306—which provides that if the soldier is "discharged on account of wounds received or disability incurred in the line of duty, then the term of enlistment shall be deducted from the time heretofore required to perfect title, without reference to the length of time he may have served," and required a modification of the decision of your office to that extent. Hence the statement made in said case, as above quoted, was necessary to the proper adjudication thereof and may not therefore be regarded as mere *dicta*. Nor is the ruling in said case one of recent origin. It has been held uniformly that the qualifications of the soldier, when application is made for a homestead under section 2306 of the Revised Statutes, must be determined under the limitations found in section 2304, which provides that the soldier shall have "served in the Army of the United States during the recent rebellion for ninety days." Thus, in the case of J. B. Haggin (7 L. D., 287, 288), it was said:

Section 2306 gives the right to an additional homestead under certain circumstances to those *only* who are entitled under the provisions of section 2304 to enter a homestead, etc., and said section 2304 is applicable by its terms only to those who served in the Army of the United States, etc., for ninety days (the original act of June 8, 1872, said ninety days or more), and a copy of the said soldier's discharge attached to the entry herein discloses the fact that he enlisted on the 10th day of September, 1864, to serve sixty days, and was discharged on the 2d day of December, 1864, having served but eighty-three days in all.

This seems to have been overlooked heretofore, but as it is conclusive of the case it will be unnecessary to discuss the military status of the "enrolled Missouri Militia."

Residence is not required to perfect title under section 2306, while by the express terms of section 2305 it relates to those of whom a period of residence is required. Therefore section 2305 necessarily refers to the original entry made by a soldier, so that even in the absence of the express limitation found in section 2306, based on section 2304, said section 2305 would not be looked to in determining the

qualifications of the soldier in the matter of an application under section 2306. Separate and distinct classes are contemplated in sections 2305 and 2306, namely, those honorably discharged on account of wounds received or disability incurred in the line of duty, and who are to be credited with the term of their enlistment in the matter of residence, regardless of the length of service, and those honorably discharged after an actual service of ninety days. While a soldier who made entry under the homestead law for less than 160 acres would be entitled to the provisions of section 2305, he would not be entitled to the provisions of section 2306, unless he had served ninety days. The latter privilege is only conferred upon the soldier who, in the express language of the law, served for ninety days, and is in no way dependent upon the completion of the original entry.

It is likewise contended that the sections of the Revised Statutes in question should be construed as *in pari materia* with the general system of homestead laws. That there is a well defined distinction between the right of homestead entry conferred by section 2289 of the Revised Statutes, and the additional right conferred upon certain soldiers by section 2306, is clearly set forth in the case of *Webster v. Luther* (163 U. S., 331).

The language employed in section 2306, as well as that in section 2304, is plain and unambiguous. It is therefore not open to interpretation. Whatever construction might possibly be placed upon the original act of June 8, 1872, *supra*, said act is, by the express language of the repealing clause, section 5596 of the Revised Statutes, no longer in force. Resort may therefore be had to said act to interpret the sections in question only in case of some doubt as to the language employed therein. As was said in the case of *United States v. Bowen* (100 U. S., 508, 513), which possesses some similarity to this one:

Where there is a substantial doubt as to the meaning of the language used in the revision, the old law is a valuable source of information. The Revised Statutes must be treated as the legislative declaration of the statute law on the subjects which they embrace on the first day of December, 1873. When the meaning is plain, the courts cannot look to the statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language used in expressing the meaning of Congress.

The motion for review is hereby denied.

SECOND HOMESTEAD—SOLDIERS' ADDITIONAL.

EDGAR A. COFFIN.

One entitled under section 2 of the act of March 2, 1889, to make a second homestead entry for 160 acres, does not, by an entry under said act for a less area, affect his right to make a soldiers' additional homestead entry under section 2306, Revised Statutes, where the aggregate of both entries does not exceed such quantity.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *October 25, 1902.* (J. R. W.)

Edgar A. Coffin appealed from your office decision of April 22, 1902, rejecting his application under section 2306 of the Revised Statutes, as assignee of David L. Cowan, to enter lots 4 and 9, sec. 18, and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, sec. 8, T. 151 N., R. 25 W., 5th P. M., 79.66 acres, Duluth, Minnesota.

Cowan is shown by the War Department records to have rendered the requisite military service and made homestead entry, at Springfield, Missouri, for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 14, T. 22 N., R. 31 W., 80 acres, canceled on relinquishment February 15, 1873, and November 3, 1892, he made a second entry under section 2 of the act of March 2, 1889 (25 Stat., 854), for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 24, T. 22 N., R. 31 W., Springfield, Missouri. Your office decision held that "his additional right under Sec. 2306, R. S., was exhausted by his making the last-mentioned entry. His application is therefore rejected."

The right given by section 2306 of the Revised Statutes is defined by the court, in *Webster v. Luther* (163 U. S., 331, 340), to be "a compensation for the person's failure to get the full quota of one hundred and sixty acres by his first homestead entry," and (ib., 341) "in the nature of compensation for past services," and it was held by the court that "It vested a property right in the donee."

On the other hand, the right given by the act of March 2, 1889, *supra*, is the offer of land to the landless, as "public policy requires the peopling of the vacant public lands." (Ib., 340.)

There is, therefore, nothing inconsistent between the two rights, as they have different purposes and proceed from different motives impelling legislative action. But for an apparent general intent of the homestead laws, as a whole, to limit the amount that may be acquired thereby to a total of 160 acres, or one quarter section, the two rights, under both acts, might consistently be exercised to the full extent. Cowan having two distinct rights, limited, however, to an aggregate of 160 acres, might elect to make entry under the act of March 2, 1889, for 80 acres only, and retain his military right for the residue. This is what he did. He might have taken full 160 acres under the act of March 2, 1889, and have waived his military additional right. But, if the military right was the more valuable, it was an unfettered property right, which he might retain or sell, and take 80 acres, as he did, under the later act. The object of that act is thereby secured; neither act is violated in spirit; and he is within the letter of both.

Your office decision is reversed.

gress could have done, but, Does the grant, as made by the act of July 2, 1864, include lands withdrawn for *any* purpose at the date of its passage?

The Northern Pacific grant was only of "public lands," and, as said in *Barker v. Harvey* (181 U. S., 481, 490)—

these words have acquired a settled meaning in the legislation of this country. "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." *Newhall v. Sanger*, 92 U. S., 761, 763. "The grant is of alternate sections of public land, and by public land, as it has been long settled, is meant such land as is open to sale or other disposition under general laws." *Bardon v. Northern Pacific Railroad Co.*, 145 U. S., 535, 538. See also *Mann v. Tacoma Land Co.*, 153 U. S., 273, 284.

A withdrawal of lands beyond the terminus and wholly outside of the grant in support of which the withdrawal was made was held valid in *Wolcott v. Des Moines Company* (5 Wall., 681), and declared sufficient to withhold the lands covered by the withdrawal from the operation of a subsequent railroad land grant with the ordinary reservation clause in it. A withdrawal in support of the provision for indemnity in a railroad land grant was also sustained against a subsequent railroad land grant, even where the lands withdrawn were not required to satisfy the losses in place. *Northern Pacific Railroad Company v. Musser-Sauntry Company* (168 U. S., 604). See also *Spencer v. McDougal* (159 U. S., 62).

The authority of the Secretary of the Interior to make the withdrawal on the filing of the map designating the general route of the Lake Superior and Mississippi railroad can not be seriously questioned, and it follows that during the continuance of this withdrawal the lands so withdrawn were not "public lands" within the meaning of that term as used in land-grant legislation. *Minnesota v. Hitchcock* (185 U. S., 373, 391) is also in point.

The object of the appeal herein was to secure a reconsideration of the departmental decision of July 16, 1901, above referred to, and upon a careful consideration of the brief filed in support of the appeal, the Department adheres to its previous decision, and your office decision is therefore accordingly affirmed.

RAILROAD LAND—SECTION 5, ACT OF MARCH 3, 1887.

HOWELL v. HANNON ET AL.

A person entitled to make purchase under the provisions of section 5 of the act of March 3, 1887, upon being advised of an adverse claim asserted to the land under the homestead law, should make prompt assertion of his right of purchase by filing his application in the district land office, and his failure to make timely assertion of claim under such circumstances will bar his right of purchase as against the adverse claimant in possession.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *October 27, 1902.* (F. W. C.)

The Department has considered the appeal by Alfred J. Howell from your office decision of April 15, last, rejecting his final proof offered under his homestead entry No. 8857, covering the NE. $\frac{1}{4}$ of Sec. 33, T. 1 N., R. 8 W., Los Angeles land district, California, and awarding to J. V. Hannon and Cassie L. Foss the right to make purchase of said land under the provisions of section 5 of the act of March 3, 1887 (24 Stat., 556).

This tract is within the indemnity limits of the grant made by the act of July 27, 1866 (14 Stat., 292), in aid of the construction of the Atlantic and Pacific railroad, which road was never constructed in the State of California and the grant appertaining thereto was forfeited and restored to the public domain by act of Congress approved July 6, 1886 (24 Stat., 123). It is also within the primary limits of the grant made by the act of March 3, 1871 (16 Stat., 573), in aid of the construction of the Southern Pacific branch line. Lands having a like status were held to be excepted from the operation of the Southern Pacific branch line grant in *United States v. Colton Marble and Lime Company*, and *United States v. Southern Pacific Railroad Company* (146 U. S., 615), the date of the decision in these cases being December 12, 1892, but the particular tract here in question was not involved in those suits but was included in a later suit brought by the United States, which was carried to the supreme court and which is reported in 168 U. S., 1, the decision being rendered in the last-mentioned case October 18, 1897.

Following this decision your office formulated instructions governing the formal restoration of these lands to entry, which were contained in your office letter of April 15, 1898, addressed to the local officers, and required a publication of the notice of restoration for at least thirty days prior to the date fixed for the receipt of entries. This notice was duly given in the Los Angeles Daily Times, the date fixed for the opening being September 6, 1898.

On November 4, following, Howell made homestead entry of this land and, after due notice by publication, submitted final proof May 16, 1901. After Howell had given notice of his intention to offer proof, to wit, on May 13, 1901, J. Vincent Hannon and Cassie L. Foss filed their joint application to purchase this land under the provisions of section 5 of the act of March 3, 1887, *supra*, and on the date Howell offered his final proof filed protest against the acceptance of the same. Proof was submitted under the application to purchase June 27, 1901, against the acceptance of which Hannon protested and the entire matter was set for hearing on July 2, 1901, on which date both parties appeared and submitted testimony in support of their claimed rights

in the premises. Upon the testimony adduced the local officers found that Howell had shown the utmost good faith in so far as residence and improvement of his claim is concerned, but recommended that his proof be rejected because it was held that a right of purchase attached to this land upon the passage of the act of March 3, 1887, which act did not limit the time within which the right must be asserted, and that this right was prior and superior to Howell's claim under his homestead entry. Upon appeal your office affirmed the decision of the local officers, from which Howell has appealed to this Department.

The fifth section of the act of March 3, 1887, under which application is made to purchase this land, provides:

That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the *bona fide* purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said *bona fide* purchaser, his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the *bona fide* occupation of adverse claimants under the preemption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said preemption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further*, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

It is true that this act places no limit upon the time within which the right of purchase must be exercised, and, in the absence of an adverse claim, it may be that no question would be raised by the Government as to the timely assertion of the right. That a party may be guilty of laches in asserting such a right, however, is clearly determined by the decision of the supreme court in the case of *Gallihier v. Cadwell* (145 U. S., 368). That case involved a claimed right of purchase under the provisions of section 2 of the act of June 15, 1880 (21 Stat., 237), which section granted a right of purchase to any person who had theretofore under any of the homestead laws entered lands properly subject to such entry, or to persons to whom the right of having so entered homesteads may have been attempted to be transferred by a *bona fide* instrument in writing. In that case (p. 372) it was said by the court, in considering the question of laches—

The cases are many in which this defence has been invoked and considered. It is true, that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights,

and an ample opportunity to establish them in the proper form; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them.

In the case under consideration it is shown that the applicants are duly qualified to make purchase under the provisions of the fifth section of the act of March 3, 1887, and the only question for consideration is as to whether they are guilty of such laches as estops them from asserting their right of purchase as against Howell, and in this connection it becomes necessary to consider the acts performed by the several claimants in the matter of their assertion of claim to this land.

So far as shown by the record, the claim of the Southern Pacific railroad heretofore asserted to this land was first contested by one Lockyard, who tendered a timber culture application therefor in 1886, which was rejected by the local officers for conflict with said grant. From such rejection he appealed, the case being finally disposed of by departmental decision of December 6, 1890 (not reported), wherein the action of the local officers was affirmed.

Lockyard relinquished his claim formerly asserted to this land to Frank B. Foss, husband of Cassie L. Foss, who moved upon the land with his family in 1887, and continued to reside thereon until about January, 1892, erecting thereon a valuable house. Finding that under the then existing rulings he would be unable to acquire title under the settlement laws, he entered into negotiations with the railroad company to acquire its title, and on August 26, 1891, that company, in consideration of \$850, executed a quit-claim deed to this land, in favor of William H. Foss, the father of Frank B. Foss. Shortly thereafter Frank B. Foss and his family removed from the land, and have not since resided thereon. The house built by Foss was sold by him, and removed from the land before the settlement thereon by Howell, as hereinafter stated.

About the time that Frank B. Foss removed from the land one McCulloch attempted to initiate claim thereto under the settlement laws, his claim being rejected for conflict with the Southern Pacific grant, and he was succeeded by one Anson, who in turn sold his possessory claim to Howell, the present claimant.

Howell settled upon the land in April, 1898, and has resided thereon with his family continuously ever since. At the time of his settlement thereon there were no improvements upon the land excepting those placed thereon by McCulloch and Anson and purchased by Howell. He now has a house, barn, fencing and other improvements of the value of \$600. He has a garden covering about an acre, but has used the land chiefly for grazing cattle and as a bee ranch, having

180 stands of bees. Howell knew of the outstanding quitclaim deed from the railroad company to William H. Foss at the time he made settlement.

It seems that upon the local office records is the following notation under section 33, T. 1 N., 8 W.: "NE. $\frac{1}{4}$, F. B. Foss, Pomona, or Baxter, Los Angeles, to be notified in case any filing is offered, for he has a quitclaim deed from the railroad." Just when this notation was placed upon the local office records is not shown, and in the examination of Frank B. Foss, at the hearing, he stated that he did not know. He swears that he never received any notification that this land was open to entry, and that the first knowledge he had of Howell's possession was in May, 1899, when visiting the land with his father. Just what occurred at the time of said visit is in some doubt, but it seems that Frank B. and William H. Foss were then fully advised of Howell's adverse claim and possession. Foss did not inform Howell that he claimed a right of purchase under the act of March 3, 1887; in fact, the record does not indicate that he then had any intention of asserting any such right.

Being informed of Howell's adverse possession and of his entry made of the land under the homestead law, it was incumbent upon Foss, if intending to purchase the land under the act of 1887, to make prompt assertion of his right so to do by filing his application in the district land office. This he failed to do and it was not until after the lapse of about two years, and only after Howell had published notice of his intention to offer final proof, that William B. Foss transferred the land to Cassie L. Foss and she and her husband in turn transferred a one-third interest therein to J. V. Hannon, who, by the way, is the attorney engaged in the prosecution of the pending application of purchase, when application to make purchase under the act of 1887 was filed.

In the case of *Galliher v. Cadwell*, *supra*, it was said by the court (p. 373) after citations from many cases bearing upon the doctrine of laches:

But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not like limitation, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties.

When it is remembered that land having a status of that here in question was, as early as 1892, held to be excepted from the operation of the Southern Pacific grant; that after prolonged litigation this particular land with many thousand acres, was in 1897 held to be excepted from that grant; that due notice of the opening of these lands to entry was given by publication in a leading newspaper of Los Angeles; that the purchaser from the company had actual notice of the adverse pos-

session of Howell in May, 1899; and that no steps were taken to assert a right of purchase under the act of 1887 until two years thereafter, during which time Howell was continually improving the land, and that such right was then asserted only because of Howell's published notice of intention to offer final proof under his homestead entry allowed nearly three years before, it seems clear that justice requires that as against the claim of Howell this claimed right of purchase be not now recognized.

Your office decision is therefore accordingly reversed and the case herewith remanded for your consideration of Howell's claim under his entry and proof heretofore submitted.

SCHOOL LAND—INDEMNITY SELECTION—ASSIGNMENT OF BASE.

INSTRUCTIONS.

The assignment by a State, as a base for the selection of land as indemnity under its school grant, of a portion only of a smallest legal subdivision, where the whole of that legal subdivision has been lost to the State, will not be accepted by the Department.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *October 29, 1902.* (V. B.)

Your letter of July 16, 1902, wherein you ask instructions relative to indemnity school land selections, has been received and considered.

The question about which you ask advice is stated by you as follows:

May the State select a tract containing less than 40 acres, and use as a basis therefor an equal area in a full 40-acre legal subdivision, alleged to have been lost to the State, because of its mineral character, when it does not appear in the application what particular part of the 40-acre tract is so used, nor from the records that any particular portion of the 40-acre tract is lost to the State apart or separate from its status as a part of the full 40-acre tract?

It is assumed that you wish to be advised whether a State, having selected under its school grant, as indemnity land, a legal subdivision, containing less than 40 acres, the Department will accept as a base therefor the assignment of an equal number of acres in the larger area of a legal subdivision containing 40 acres, theretofore lost to the State, without a specific designation of the particular part of the lost subdivision thus assigned as a base.

The circulars and decisions of the Department, cited in your letter, seem sufficiently to answer the inquiry in the negative and to show that it is not allowable to assign as a basis a portion of the smallest legal subdivision whether the particular part thus assigned be specifically designated or not. No reason is suggested why the rules thus

laid down should be departed from, whilst good administration requires they should be rigidly adhered to.

The primal rule is that all selections should be made and bases assigned of legal subdivisions equal in area. This rule should also be followed, if possible, where the legal subdivisions are of less than the full quantity.

But necessarily there are exceptions to this general rule. Where, for a sufficient reason, the lost basis is a fraction less than 40 acres and it is not practicable to find a desirable fractional subdivision of equal area, one may be selected containing "a little more or a little less," the difference to be charged or credited to the State and disposed of in the course of the adjustment of the grant, as stated in the case of *Melvin et al. v. California* (6 L. D., 702), cited by you. But it is not permitted to assign, as a base, or part of a base, for a selection, only a portion of the smallest legal subdivision where the whole of that legal subdivision has been lost to the State.

INDIAN LANDS—ALLOTMENTS—EJECTION OF INTRUDERS.

OPINION.

The guardianship and control of the United States over the Indians continues after their lands have been allotted to them in severalty and after they have become citizens of the United States, and the government has full authority to use military force to eject intruders from the allotments of the Indians.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, November 15, 1902. (W. C. P.)

The Indian agent at Kiowa agency, Oklahoma, having reported that numerous cattle owners have come with their herds upon lands allotted to Indians in the Kiowa agency without authority, and having refused upon his demand to remove from such allotments, and that he can not eject these trespassers with the Indian police, the Commissioner of Indian Affairs submitted the matter with the recommendation that the President be requested to direct the Secretary of War to order a sufficient military force to the Kiowa agency to eject all intruders from the Indian allotments. You have submitted the matter for my "views and opinions as to the authority of the Secretary in this matter."

A similar complaint was made by this agent in October, 1901, and this Department requested the President to send troops to that agency for the purpose of removing intruders, basing such action upon the opinion of Attorney-General Miller, of March 12, 1890 (19 Ops., 511). In that opinion the Attorney-General referred to an opinion of Acting Attorney-General Jenks of July 27, 1888 (19 Ops., 161), holding that

a State had not the power to tax lands occupied by Indians as separate allotments under the then existing legislation, and continued as follows:

As will be seen by that opinion, the conclusions there reached rest largely upon the proposition that notwithstanding the Indians, by taking separate allotments, have made a first and a long step toward civilization and independent citizenship, yet they are still in a state of pupilage and under the guardianship of the General Government. Upon the same ground, I am clear that it has not been the intention of Congress, in any legislation so far, to put these Indians, who take such separate allotments, entirely upon their own resources or to withdraw the Government's guardianship, supervision, and protection. The fact, if there were no other, that their lands so allotted are made inalienable, that the allottee has no power to cumber or charge the same with debt, would be a clear indication that Congress had not intended to remit him to courts of law for the protection of those lands; for it would be worse than idle to expect a man so untutored, so improvident, so much of a child that he can not be trusted with a control over his property, would be able, without any power to charge that property for any purpose, to protect the same in a court of law. In other words, I am entirely clear that it is the duty of the Government to protect these Indian allottees in the enjoyment of their allotments.

And as to the authority to use the United States troops for the protection of the Indians in the use and possession of their allotments, the Attorney-General said:

The Supreme Court has repeatedly decided that "Indian country" is all country to which the Indian title has not been extinguished. The Indian title to the lands allotted in these reservations under the act of March 2, 1889, is modified, but I do not think it can be said to be extinguished. In pursuance of treaties with the Indians the lands are partitioned in severalty to the Indians, not because the ordinary Indian title has been totally extinguished, but because the Indians have consented to such arrangement. This being so, and in view of the relation of guardianship, the Government still bears, and the duty of protection it still owes to these Indians, I have no doubt of the right of the President to use the troops for the protection of these allotments.

Full authority is found in this opinion for the action recommended by the Commissioner of Indian Affairs:

The continued guardianship and control of the United States over the Indians, after their lands have been allotted to them in severalty and after they have become citizens of the United States has been fully sustained by the courts. *Eells et al. v. Ross* (64 Fed. Rep., 417, 420); *Beck v. Flournoy Live Stock, etc., Co.* (65 Fed. Rep., 30, 35); *United States v. Flournoy, etc., Co.* (69 Fed. Rep., 886, 891); *Farrell v. United States* (110 Fed. Rep., 942); *State v. Columbia George* (65 Pac. Rep., 604).

Approved, November 15, 1902.

E. A. HITCHCOCK, *Secretary*.

DESERT LAND ENTRY—COMPACTNESS—SEC. 1, ACT OF MARCH 3, 1877.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.

Washington, D. C., November 28, 1902.

Registers and Receivers,

United States Land Offices in Arizona,

California, Colorado, Idaho, Montana,

Nevada, New Mexico, North Dakota, Oregon,

South Dakota, Utah, Washington and Wyoming.

GENTLEMEN: Your attention is called to the requirement of the last proviso of section 1, act of March 3, 1877 (19 Stat., 377):

Provided, That no person shall be permitted to enter more than one tract of land, and not to exceed six hundred and forty acres, which shall be in compact form.

The requirement by said act that desert land entries "shall be in compact form" was not changed by the amendment to said law by the act of March 3, 1891 (26 Stat., 1095).

You are hereby directed to require claimant, in all cases where the land included in a desert land application does not form a compact body (that is, where there is a material departure from a technical half-section or lesser legal subdivision) to either amend the application so as to take land in a compact form or to furnish an affidavit corroborated by two witnesses, showing that the entry is as compact as may be, taken in relation to the topography of the surrounding country and the prior appropriation of adjacent lands. This affidavit should be in addition to the other papers in the case and should set forth clearly and in detail the facts in relation thereto.

Your strict attention to this matter is requested, in order that the time and labor involved in curing these defects by this office may be reduced to a minimum.

Very respectfully,

BINGER HERMANN, *Commissioner.*

Approved:

E. A. HITCHCOCK, *Secretary.*

ALASKAN LANDS—HOMESTEAD—SOLDIERS' ADDITIONAL—ASSIGNEE.

INSTRUCTIONS.

The limitation in the last proviso to section 1 of the act of May 14, 1898, relating to entries of public lands in the district of Alaska, "that no homestead shall exceed eighty acres in extent," applies to the acreage that may be included in a single homestead entry, and does not limit the number of entries that may be made by an assignee of several soldiers' additional rights under section 2306, Revised Statutes.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *December 4, 1902.* (A. S. T.)

This Department is in receipt of your letter of November 21, 1902, requesting instructions as to whether or not the last proviso to section 1 of the act of May 14, 1898 (30 Stat., 409), places a limitation upon the right of the assignee of a soldier's additional right of homestead entry under section 2306 of the Revised Statutes, so as to prevent the assignee of several of such additional rights from making several entries of eighty acres each thereunder of public lands in the district of Alaska.

Said proviso is as follows: "And it is further provided that no homestead shall exceed eighty acres in extent."

You express the opinion that the *number* of entries that may be made by an assignee is not limited by the terms of this proviso, and in this conclusion the Department concurs. The limitation is placed upon the acreage that may be included in a single homestead entry, and can not apply to an assignee who in the exercise of the additional right does not seek to take in any one entry more than eighty acres.

HUTTON ET AL. *v.* FORBES.

Motion for re-review of departmental decision of May 3, 1902, 31 L. D., 325, denied by Secretary Hitchcock, December 5, 1902.

RAILROAD GRANT-EXCEPTED LANDS-PREEMPTION FILING.

UNION PACIFIC RAILWAY COMPANY.

A pre-emption filing accepted by the local officers and placed of record, which was subsisting at the date of the definite location of the line of the Union Pacific railway opposite the tract covered thereby, excepts said tract from the grant made by the act of July 1, 1862, to aid in the construction of said road, without regard to the qualification of the person making such filing.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *December 8, 1902.* (F. W. C.)

The Union Pacific Railway Company has appealed from your office decision of August 2, last, holding that the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 9, T. 1 S., R. 70 W., Denver land district, Colorado, was excepted from the grant made by the act of July 1, 1862 (12 Stat., 489), and July 2, 1864 (13 Stat., 356), under which it claims this land, by reason of the preemption declaratory statement filed December 26, 1868, by Timothy Shanahan, alleging settlement the same day, which filing was a subsisting claim of record at the date of the definite location of the line of said road opposite this tract, to wit, August 20, 1869.

In the appeal it is urged that said filing was an absolute nullity

because the records of your office showed that the preëmtor had, prior to making the filing in question, exhausted his preëmptive right by reason of filing a declaratory statement on July 10, 1865, for the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 3, T. 1 S., R. 70 W., Denver land district, Colorado, and that the filing covering the tract in question could not therefore serve to except the tract filed for from the operation of the railroad grant.

There is nothing in the record now before the Department, except identity of name, tending to show that said filings were made by one and the same person. If it be admitted, however, that both of said filings were made by one and the same person, and that Shanahan was by reason of his first filing disqualified from making another, it nevertheless remains a fact that the local officers in permitting him to make a second filing gave recognition to his claim and entered the same upon the records, and the fact that the second filing may not have been enforceable by Shanahan and might have been canceled by the Department upon its own motion, can not affect the question as to whether the tract covered by said second filing passed under the railroad grant.

In considering the question as to the effect upon a railroad land grant of a record claim on the part of an individual under the homestead or preëmption law, existing at the date of the attachment of rights under such grant, it was held by the supreme court in the case of *Whitney v. Taylor* (158 U. S., 85, 93):

It was enough that the claim existed, and the question of its validity was a matter to be settled between the government and the claimant, in respect to which the railroad company was not permitted to be heard.

See also *Hastings and Dakota R. R. Co. v. Whitney* (132 U. S., 357, 364); *Union Pacific R. R. Co., Central Branch, v. Peterson* (28 L. D., 32).

The decision of your office is therefore accordingly affirmed.

HOMESTEAD—SOLDIERS' ADDITIONAL—SECTIONS 2306 AND 2307,
REVISED STATUTES.

HOMER E. BRAYTON.

The widow of a soldier who made homestead entry in her own right, prior to the adoption of the Revised Statutes, for less than 160 acres of land, is, by virtue of the provisions of sections 2306 and 2307 of such statutes, entitled to an additional homestead right, and if she fails to exercise such right it becomes upon her death an asset of her estate, subject to distribution as other personal property.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) December 9, 1902. (G. B. G.)

This is the appeal of Homer E. Brayton, assignee of John W. Brown, administrator of the estate of Mason G. Whitney, deceased, from your office decision of August 23, 1902, denying his application

to enter under sections 2306 and 2307 of the Revised Statutes the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 15, T. 14 S., R. 70 W., Pueblo land district, Colorado.

It appears that the said Mason G. Whitney served more than ninety days in the United States army during the war of the rebellion, and afterwards died without having exercised a right of homestead. March 31, 1870, which was prior to the adoption of the Revised Statutes, his widow, Emily Whitney, made homestead entry, in her own right, for 80 acres of land at the Springfield land office, Missouri. She afterwards died without having exercised an additional right of homestead. February 7, 1901, John W. Brown, administrator of the estate of *Mason G. Whitney*, transferred and assigned to one William E. Moses the claimed interest of said estate in an additional homestead right to 40 acres of land, and on June 24, 1901, the said Moses transferred and assigned it to the appellant, Brayton. Thus stated, this case is in all essential respects the same as the case of *ex parte E. J. McLaughlin* (not reported), decided by the Department July 25, 1902. In that case, citing the previous case of *Sierra Lumber Company* (31 L. D., 349), it was held, in substance, that the widow of a soldier, who made entry in her own right prior to the adoption of the Revised Statutes for less than 160 acres of land, was by virtue of the provisions of sections 2306 and 2307 of such statutes entitled to an additional homestead right, and further that, not having exercised the right, it became upon her death an asset of her estate, subject to distribution as other personal property.

It is earnestly insisted in the present case that the decision in the *McLaughlin* case is wrong in so far as it is therein held that upon the death of the widow the additional right becomes an asset of her estate, and it is argued that under such circumstances the right becomes an asset of the estate of the soldier.

The Department sees no sufficient reason for changing its ruling on this question. The soldier who died without having exercised a right of homestead never had an additional right, the additional right conferred upon *the soldier* by section 2306 being dependent upon the fact that he had previously entered a quantity of land less than 160 acres under the homestead law. If, then, he died without being seized of any right conferred by said section, how can it be well said that upon his death the right became an asset of his estate? The additional right conferred by sections 2306 and 2307 may be either for the soldier or his widow, and the circumstances of the case will control. If the soldier made the original entry, the additional right is his, but if the original entry was made by the widow, the additional right is hers. Upon her failure to exercise it during her life, it becomes an asset of her estate, and as such is not subject to the control of the administrator of the soldier's estate.

The decision appealed from is affirmed.

OKLAHOMA LAND—HOMESTEAD—COMMUTATION—ACT OF JUNE 6, 1900.

INSTRUCTIONS.

Commutation may be allowed of all homestead entries made under the act of June 6, 1900, without reference to whether the entryman had previously commuted an entry under section 2301 of the Revised Statutes.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) December 22, 1902. (G. B. G.)

Your office communication of December 10, 1902, recites that one E. P. McMahon has entered, at Lawton, Oklahoma, a tract of land under the act of June 6, 1900 (31 Stat., 672, 676, 679-680), and that previous to making such entry he had made an entry of a tract of land in South Dakota, and perfected the same by commutation under section 2301 of the Revised Statutes; that he now seeks to commute the entry made in Oklahoma under the said act of June 6, 1900; and that in view of the fact that there are a number of persons occupying the same status who desire and are offering to make commutation proof upon the lands entered by them in Oklahoma, and in view of the fact that a decision by your office upon this question might not be sustained by the Department, and might therefore result in harm, a question is submitted, whether under the law these entries may be commuted to cash.

The act of June 6, 1900, *supra*, provides that lands acquired by agreement from the Comanche, Kiowa, and Apache tribes of Indians, in the Indian Territory, of which these lands seem to be a part, shall be open to settlement "under the general provisions of the homestead and townsite laws of the United States," subject to several provisos, one of which is:

That in all homestead entries where the entryman has resided upon and improved the land entered in good faith for the period of fourteen months, he may commute his entry to cash upon the payment of one dollar and twenty-five cents per acre.

By an act of June 5, 1900, entitled, "An act for the relief of the Colorado Cooperative Colony, to permit second homesteads in certain cases, and for other purposes" (31 Stat., 267, 269-270), it is provided:

That any person who has heretofore made entry under the homestead laws and commuted the same under the provisions of section twenty-three hundred and one of the Revised Statutes of the United States, and the amendments thereto, shall be entitled to the benefits of the homestead laws as though such former entry had not been made, except that commutation under the provisions of section twenty-three hundred and one of the Revised Statutes shall not be allowed of an entry made under this section of this act.

In view of these statutes, the question submitted is, whether the provisions of the act of June 5, 1900, above quoted, operate as a limitation upon that provision of the act of June 6, 1900, which authorizes the commutation of "all homestead entries" of lands acquired by agreement with the Comanche, Kiowa, and Apache tribes of Indians.

Your office suggests that no such limitation exists, and the Department is constrained to concur in this view.

The provision referred to in the act of June 5, 1900, is a general one, while that referred to in the act of June 6, 1900, is special. To the extent, therefore, that they are in conflict the later statute would prevail, and the later statute provides that commutation may be allowed of *all* homestead entries made under that act, without reference to the fact whether the entryman had previously commuted an entry under section 2301 of the Revised Statutes. Moreover, the provision in the act of June 5, 1900, limiting the right of commutation to instances where the entryman had not theretofore commuted an entry under the provisions of section 2301, only applies to entries made under that act, and the entries in question were not made, and commutation is not sought, under the act of June 5, 1900.

The Department is of opinion that there is nothing in the act of June 5, 1900, which operates to prevent the completion by commutation of homestead entries made under the act of June 6, 1900.

PRIVATE CLAIM—RIGHT OF PURCHASE—SEC. 7, ACT OF JULY 23, 1866.

COUTS *v.* STRICKLER ET AL.

(RANCHO BUENA VISTA.)

The use of uninclosed land for the pasturing of stock, and the exclusion of others therefrom by means of a keeper or herder, constitutes possession thereof, within the meaning of section 7, act of July 23, 1866.

The word "improved" as used in said section contemplates the utilization of the lands applied for under said section for some recognized purpose of settled and civilized life, not necessarily by the erection thereon of buildings like houses and barns, especially where such structures are located on adjacent land and are adapted to use on the land applied for. Lands so used and occupied are within the intendment of the statute.

The right of purchase under said section is not defeated by adverse settlement claims, acquired after the passage of said act, with full knowledge and notice of the right asserted by the grant claimant to the lands upon which settlement was so made.

Acting Secretary Ryan to the Commissioner of the General Land
(W. V. D.) *Office, December 27, 1902.* (J. R. W.)

Cave J. Coutts, administrator of the estate of Cave J. Coutts, deceased, appealed from your office decision of May 28, 1902, rejecting his application, under section 7 of the act of July 23, 1866 (14 Stat., 218), to purchase certain lands on final survey excluded from the Rancho Buena Vista, Los Angeles land district, California.

December 27, 1897, the administrator of the estate of Cave J. Coutts, deceased, filed in the office of the surveyor-general for California his application to purchase certain lands excluded from the final survey of the Rancho Buena Vista. As the survey ordered for connecting

the public surveys with the final survey of the grant was not completed, the applicant did not describe by legal subdivisions the tracts applied for, but filed a map showing their location and a chain of conveyances from the original grantee, making a *prima facie* case. Several settlers filed protests against Coutts's application, and your office directed a hearing at the local office between the applicant and the protestants to determine the applicant's rights under said act. July 9, 1901, the parties appeared in person and with counsel and fully participated in a hearing. March 7, 1902, the local office found in favor of the applicant, and recommended that the application be allowed and the protests be dismissed. Your office reversed the action of the local office and rejected the application.

The origin, extent, and history of the Buena Vista grant and proceedings had for its survey and location will be found at 1 L. D., 210; 2 Ib., 366, 370; 5 Ib., 559; 6 Ib., 41; 13 Ib., 84; 14 Ib., 259; 19 Ib., 201; to which reference is here made.

July 8, 1845, a grant was made by the Mexican authorities to the Indian "Felipe" "to the extent of half a square league," not described by boundaries, and directing juridical possession to be given, which act took place August 5, 1845, and the location and extent were described as "commencing at one of the boundaries of" Felipe's garden, thence east, south, west, north, 2,500 varas, describing a square and mentioning monuments. The square was half a league each side and contained but a quarter of a square league of land, which was only half the quantity stated in the grant. April 14, 1879, after proceedings not here necessary to recite, a decree was entered by the district court of the United States for the district of California, *as of* February 1, 1856, confirming the grant:

To the extent of one-half of a square league of land, a little more or less, being the same land which was situated in the county of San Diego known by the name of Buena Vista, and bounded and described as follows:

reciting the points, courses, distances, and monuments given in the act of juridical possession, so that while the decree in terms confirmed the grant to the extent of half a square league, the ambit of the grant described in the act of juridical possession and decree called for but half that area.

Six surveys of the grant have been made. The first was by Deputy Surveyor Hays, September, 1858, for a tract 134.49 chains by 165 chains, containing 2,219.08 acres, half the area of a square league, and was approved by the surveyor-general October 19, 1858. There was an error in this survey in connecting it with the township line between township 11 south, ranges 3 and 4 west, whereby it was indicated on his plat to lie about a mile east of its actual location on the ground, as shown by his monuments. The survey was not published as required by law until 1884, pursuant to your office letter of April 9, 1883 (1 L. D., 210). This survey was for such error rejected by

your office decision of May 27, 1884 (2 L. D., 366), and a new survey ordered. At that time your office decision held that:

The claim in the present case was confirmed by the boundaries set forth in the decree, being the same designated in the act of juridical possession, and was for the land included within said boundaries. The clause following the specification of boundaries — “containing in all one-half of a square league of land” — is clearly an estimate merely, and not intended as a limitation of quantity within the boundaries. The measurements mentioned are only the estimated distances between the boundaries forming the corners of the tract. This is manifest from the declaration in the confirmatory clause of the decree, “that the said claim be, and the same is hereby, confirmed to the extent of one-half of a square league of land, *a little more or less, . . . bounded and described as follows.*”

The Hays survey is rejected for the erroneous connections in its plat and descriptive notes, and for the further reason that it identifies and conforms to but one of the boundary calls—that which is made the southwest corner—and a new survey is hereby directed to be made to conform to the described boundaries as nearly as practicable. It should adopt the northwest corner as located by Strobel, “on a hill where is a big rock;” the southwest corner, as described by Hays and located by Minto, on top of a red hill; and it would seem that the southeast corner, “a small peak, where stand two rocks joined together,” might be found and identified by the description thereof given.

Other surveys were made, not necessary here to discuss, and a final one was made by Deputy Surveyor Treadwell, in 1893 and 1895, which was approved, and May 6, 1897, patent issued thereon. By the final survey and patent 1,184.89 acres were included and conveyed under the grant, and almost half the land included in the Hays survey of 1858 was excluded therefrom.

In the meantime, through mesne conveyances and proceedings in probate, the Buena Vista Rancho came to Maria Ygnacia Morena de Alvarado, from whom Cave J. Coutts, November 28, 1866, purchased this with other lands for a consideration therein stated to be \$3,000 paid, and the deed described the premises conveyed as:

The land and rancho Buena Vista, containing two thousand two hundred and nineteen acres of land, more or less, which was granted to Felipe Tubua in the month of July, of the year one thousand eight hundred and forty-five, . . . more amply described according to the survey which was made by John C. Hayes, surveyor-general of the United States for the State of California.

The local office and your office found upon the evidence that Coutts and his predecessors in estate recognized as the west boundary of the grant a road from Milpitas to Guajome, which touches the northwest corner, and in two miles diverges westward to about one-third of a mile from the southwest corner of the Hays survey of the grant.

The first settlers went on the land June 21, 1886, and by concert made a journey of several days in different ways so as to arrive together. Before setting out they knew the land was claimed to be part of the Buena Vista grant claimed by Coutts. Before they went on the land they had an examination of the old Spanish archives, got a copy of the record pertaining to this grant, and employed a surveyor who lived in the vicinity. Prior to their settlement the W. $\frac{1}{2}$ of sec-

tion 19, the NW. $\frac{1}{4}$ of section 30, township 11 south, range 3 west, and the S. $\frac{1}{2}$ of section 24 and N. $\frac{1}{2}$ of section 25, township 11 south, range 4 west, were in large part plowed and cultivated by Coutts and those holding under him, and his stock, in charge of a keeper, was ranging on the land he applies to purchase, but there were no buildings or fences on the land they settled on. Coutts warned them the day after their arrival and before they made any improvements that he claimed the land as part of the Buena Vista grant. They perfectly knew they were entering upon land he was claiming, but were of opinion upon examination of the facts that upon a proper construction and location of the grant the land was not embraced within its actual boundaries. The event proved that their conclusions were well founded. The grant has been finally surveyed and patented, and the land is excluded from it. The present claim, an application by Coutts to purchase, is not a claim that the land was included within the grant, but is based on the fact that it was not so included, but that the facts are such that he is within the benefits of the act of July 23, 1866, and he is therefore entitled to purchase it. The act provides:

That where persons in good faith and for a valuable consideration have purchased lands of Mexican grantees or assigns, which grants have subsequently been rejected, or where the lands so purchased have been excluded from the final survey of any Mexican grant, and have used, improved, and continued in the actual possession of the same as according to the lines of their original purchase, and where no valid adverse right or title (except of the United States) exists, such purchasers may purchase the same, after having such lands surveyed under existing laws at the minimum price, established by law, upon first making proof of the facts as required in this section, under regulations to be provided by the Commissioner of the General Land Office.

The settlers' contentions are that the proofs fail to show that the land in question was purchased by Coutts in good faith for value; that they were used, improved, and continued to be held in actual possession according to the lines of his original purchase; that they are not proved to be non-mineral; that the applicant is not qualified to make the purchase as Coutts's legal representative; that adverse rights exist in the settlers which bar the purchase.

The evidence shows that the several grant claimants asserted and maintained exclusive right of possession westward from the ranch house to the Milpitas road, which was close to the west boundary of the grant as surveyed by Hays. Before Coutts's purchase, Soto, and after his death Mrs. Soto and her second husband Alvarado, exercised such dominion and assertion of right as also did Coutts after his purchase. At the time of Coutts's purchase, November, 1866, the Hays survey had subsisted more than eight years approved by the surveyor-general, and was referred to in the deed of conveyance as defining the lands purchased, both as to location and quantity. Had there been no survey the Milpitas road, being recognized as the western boundary of the grant, or even an imaginary line between two fixed points

readily identified so recognized, and having definite place on the earth's surface, would be sufficient for all requirements of the act, to define "the lines of their original purchase." That an official survey had in fact been made by the government fixing substantially the same boundary is important only in affording record evidence of what before rested only in parole. It is of higher evidential value because matter of record. One buying before any approved survey of the tract purchased must necessarily do so with view to some accepted, supposed, or believed lines as to its extent, and such are the lines of original purchase. The existence of a survey, accepted, and referred to by the parties in their deed, though not finally approved, only serves as a better and higher degree of evidence to make definite the lines, which otherwise could be proved only by parole testimony.

The use of the land for grazing and herding was that to which it was best adapted in the then condition of the country, and the possession by pasturing the claimant's stock, and exclusion of that of others by means of a keeper, or herder, instead of by a fence, was nevertheless a maintaining of possession. *Webber v. Clark* (74 Cal., 11); *McCreery v. Everding* (44 Cal., 246). Possession is the subjection of the locus, or thing, to the dominion and control of the claimant; the exclusion of others from its use and its appropriation to one's own use. If this is done, by whatever means, by fence or by keeper, possession is maintained.

The extent, nature, and kind of improvement necessary to enable one to claim benefit of the act are not therein defined. There were no buildings upon the lands applied for. Some of the land was brought into cultivation, but the number of acres or proportion in that way improved does not appear in the testimony. It would certainly not be a reasonable construction of the act to say there must be some kind of a structure on every government subdivision of forty acres. Improvements in the nature of structures are usually for convenience assembled about the proprietor's house, and so ordinarily stand on a single tract of few acres, while made for the utilization of his entire holding, though that may include several thousand acres. It would seem therefore that by "improved" the act contemplated the utilization of land to some recognized purposes of settled and civilized life, not necessarily by structures like houses, barns, &c., especially where such structures are elsewhere located on neighboring land and adapted to use in connection with the land applied for, and that lands so used and occupied are within the intendment of the statute.

Couts paid a valuable consideration to the former possessor and himself succeeded to the possession, and, until his death in 1874, eight years after his purchase, exercised dominion to the boundaries of the Hays survey. Cout's being dead and his testimony lost, such facts must be accepted as raising a strong presumption of perfect good faith in his purchase.

No evidence offered directly negatives his entire good faith. It is argued that as Coutts was a prudent man, well versed in business affairs, perfectly conversant with the Spanish language, and had loaned money on this title before his purchase, therefore he must have consulted the original grant and must have known its true extent. It is also insisted that as he paid but \$3000, and by his deed received conveyance for the Buena Vista Rancho, then worth about one dollar per acre, and the San Marcos Ranch, 8877.49 acres, "then worth a little less" than a dollar per acre, Coutts could not have expected to get 2219.08 acres as his Buena Vista purchase, as that would make 11,096.57 acres, worth, say, \$9200, for the consideration of \$3000 paid.

That Coutts examined the Spanish archives not merely for purposes of making a loan, but in making his purchase, is probable. That it would charge even a skillful lawyer with knowledge of what the Buena Vista grant would be finally limited to contain does not follow. The words of the grant in the Spanish were "*Media leaguea en cuadro*," which one of the witnesses testifies is properly translated as, half a league in square form, and which was translated and embodied by the court in its decree of confirmation as "one half of a square league of land." The two translations differ only in the form that should be given to the survey. That of the court gives the half league or quantity, but did not specify in square form.

Both the grant and the decree then specify courses and distances—a square of 2500 varas each side—and run to designated monuments. The square of 2500 varas, if limited to that distance, contained but half the quantity, one quarter of a square league, but natural monuments existed on the ground answering to the calls of the ambit, which would give the half league quantity, but the length of the courses would have exceeded 2500 varas.

It was certainly not a *clear case* that the grant would be limited to one quarter of a league square—a square of one half a league in dimensions—instead of one half a square league in quantity, laid off in square form, and the fact that distances controlled both monuments and quantity, in a decision made in 1887, over twenty-one years after Coutts's purchase, could not in 1866 with certainty have been foreseen.

Nor does the consideration alone impugn the good faith of the purchase. The testimony shows that Coutts did not seek to purchase, but bought at the solicitation of Mrs. Alvarado and Mrs. Coutts, somewhat reluctantly. Nor does it appear that Coutts got title to the 8877 acres in the ranch San Marcos. The deed of Mrs. Alvarado and husband conveyed only "all our right, title, and interest." There is no covenant or representation of what that interest was. The probate decree in Soto's estate, July 11, 1866, was:

That the Rancho San Marcos *being in dispute between said heirs of said deceased and other claimants*, and being incapable of partition, without injury to the owners thereof, *do remain undivided in possession in common* of said Maria Ygnacia (Mrs. Soto-Alvarado), Rosa and Vivian.

Mrs. Soto then had not more than a one-third interest in San Marcos, and that was in question between the successors of Soto and others claiming adverse to them. So that the value of what passed to him by Mrs. Alvarado other than the Buena Vista ranch is not shown, except that it was not over \$2,333, putting the value of San Marcos at \$7,000, the figure given by protestant's counsel.

But, so value in fact was paid, the inadequacy of consideration is seldom in itself evidence of bad faith, and courts seldom characterize a transaction as *mala fide* merely because of insufficiency of the consideration. One may sell for what price he will, and one may buy at the best price he can, without impeachment of the good faith of the transaction, except at the complaint of parties, like creditors then having rights, or those who in contemplation of law were intended to be defrauded. It is immaterial to these settlers whether Mrs. Soto were making this application, or Mr. Coutts, her grantee. Had they rights, such rights would not be affected by Mrs. Soto's conveyance to Coutts. Inadequacy of the consideration would not be, therefore, a badge of bad faith. But no inadequacy appears.

The administrator on behalf of the heirs to the estate is the proper one to make the application. The devolution of the right, on death of the original party in interest, is not limited by the act to any particular persons, and on his death it passed, like other rights in action, to the administrator as part of his estate.

The adverse claim of the settlers was not existing prior to the act of 1866, nor had it ever validity under the law. The grant had not been finally surveyed at the time of their intrusion into the grantees' possession, nor was the grant then finally segregated from the lands not granted. They could not, therefore, in face of the act of 1866 giving the grant claimant a right of purchase, acquire rights in the land, or cut off his pre-emption right to purchase, whether they knew of his claim or not. But they did know it, and perfectly understood the existing conditions. They can assert no right against him.

As to the non-mineral character of the land, the testimony shows that no mines of gold, silver, copper, or cinnabar exist on the tract; that there was once quite an excitement "in Soto's time," that is prior to 1866, about a supposed copper mine, and that Soto leased a tract to Rose to prospect and mine for copper near the Red Hill, in the southwest corner of the tract; that there were some copper stains there, but they proved to be a false indication, and the mineral prospect has been long since abandoned; and that this was the only mineral prospect ever heard of upon the ranch. This testimony is wholly uncontradicted, and no mineral protest was filed and no evidence was offered tending in any way to show that any part of the land contains valuable mineral deposits. The land clearly is non-mineral.

Your office decision is reversed, and the application of the administrator will be allowed.

UNITED STATES MINING LAWS, AND REGULATIONS THERE-
UNDER, RELATIVE TO THE RESERVATION, EXPLORATION,
LOCATION, POSSESSION, PURCHASE, AND PATENTING OF THE
MINERAL LANDS IN THE PUBLIC DOMAIN.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

July 26, 1901.

TITLE XXXII, CHAPTER 6, REVISED STATUTES.

MINERAL LANDS AND MINING RESOURCES.

SEC. 2318. In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law. Mineral lands reserved.

SEC. 2319. All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. 4 July, 1866, c. 166, s. 5, v. 14, p. 86. Mineral lands open to purchase by citizens. 10 May, 1872, c. 152, s. 1, v. 17, p. 91.

SEC. 2320. Mining-claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end lines of each claim shall be parallel to each other. Length of mining claims upon veins or lodes. 10 May, 1872, c. 152, s. 2, v. 17, p. 91.

Proof of citizenship.

10 May, 1872, c. 152, s. 7, v. 17, p. 94.

SEC. 2321. Proof of citizenship, under this chapter, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any State or Territory thereof, by the filing of a certified copy of their charter or certificate of incorporation.

Locators' rights of possession and enjoyment.

10 May, 1872, c. 152, s. 3, v. 17, p. 91.

SEC. 2322. The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, Territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

Owners of tunnels, rights of.

10 May, 1872, c. 152, s. 4, v. 17, p. 92.

SEC. 2323. Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid, but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel.

Regulations made by miners.

10 May, 1872, c. 152, s. 5, v. 17, p. 92.

SEC. 2324. The miners of each mining-district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of

recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures.

SEC. 2325. A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous

Patents for
mineral lands,
how obtained.

10 May, 1872, c.
152, s. 6, v. 17, p.
92.

to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

Adverse claim,
proceedings on.

10 May, 1872, c.
152, s. 7, v. 17, p.
98.

SEC. 2326. Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and

shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the Commissioner of the General Land-Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim with the proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment-roll to the Commissioner of the General Land-Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of a title conveyed by a patent for a mining claim to any person whatever.

SEC. 2327. The description of vein or lode claims, upon surveyed lands, shall designate the location of the claim with reference to the lines of the public surveys, but need not conform therewith; but where a patent shall be issued for claims upon unsurveyed lands, the surveyor-general, in extending the surveys, shall adjust the same to the boundaries of such patented claim, according to the plat or description thereof, but so as in no case to interfere with or change the location of any such patented claim.

SEC. 2328. Applications for patents for mining-claims under former laws now pending may be prosecuted to a final decision in the General Land-Office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this chapter; and all patents for mining-claims upon veins or lodes heretofore issued shall convey all the rights and privileges conferred by this chapter where no adverse rights existed on the tenth day of May, eighteen hundred and seventy-two.

SEC. 2329. Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

SEC. 2330. Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location

Description of vein claims on surveyed and unsurveyed lands.

10 May, 1872, c. 152, s. 8, v. 17, p. 94.

Pending applications; existing rights.

10 May, 1872, c. 152, s. 9, v. 17, p. 94.

Conformity of placer claims to surveys, limit of.

9 July, 1870, c. 235, s. 12, v. 16, p. 317.

Subdivisions of ten-acre tracts; maximum of placer locations.

9 July, 1870, c. 235, s. 12, v. 16, p. 217.

shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any bona fide preemption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any bona fide settler to any purchaser.

Conformity of
placer claims to
surveys, limita-
tion of claims.

10 May, 1872, c.
152, s. 10, v. 17, p.
94.

SEC. 2331. Where placer-claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer-claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral lands in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or preemption purposes.

What evidence
of possession,
&c., to establish
a right to a pat-
ent.

9 July, 1870, c.
235, s. 13, v. 16, p.
217.

SEC. 2332. Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

Proceedings for
patent for placer
claim, &c.

10 May, 1872, c.
152, s. 11, v. 17, p.
94.

SEC. 2333. Where the same person, association, or corporation is in possession of a placer-claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer-claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer-claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer-claim, or any placer claim not embracing any vein or lode-claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer-claim, an application for a patent for such placer-claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer-claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer-claim is not known, a patent for the placer-claim shall convey all valuable mineral and other deposits within the boundaries thereof.

SEC. 2334. The surveyor-general of the United States may appoint in each land-district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining-claims. The expenses of the survey of vein or lode claims, and the survey and subdivision of placer-claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey. The Commissioner of the General Land-Office shall also have power to establish the maximum charges for surveys and publication of notices under this chapter; and, in case of excessive charges for publication, he may designate any newspaper published in a land-district where mines are situated for the publication of mining-notices in such district, and fix the rates to be charged by such paper; and, to the end that the Commissioner may be fully informed on the subject, each applicant shall file with the register a sworn statement of all charges and fees paid by such applicant for publication and surveys, together with all fees and money paid the register and the receiver of the land office, which statement shall be transmitted, with the other papers in the case, to the Commissioner of the General Land-Office.

Surveyor-general to appoint surveyors of mining claims, &c.

10 May, 1872, c. 152, s. 12, v. 17, p. 95.

SEC. 2335. All affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land-district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land-office. In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party; or if such party can not be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land-office as published nearest to the location of such land; and the register shall require proof that such notice has been given.

Verification of affidavits, &c.

10 May, 1872, c. 152, s. 13, v. 17, p. 95.

SEC. 2336. Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.

Where veins intersect, &c.

10 May, 1872, c. 152, s. 14, v. 17, p. 96.

SEC. 2337. Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface-ground may be embraced and included in

Patents for non-mineral lands, &c.

10 May, 1872, c. 152, s. 15, v. 17, p. 96.

an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz-mill or reduction-works, not owning a mine in connection therewith, may also receive a patent for his mill-site, as provided in this section.

What conditions of sale may be made by local legislature.

26 July, 1866, c. 262, s. 5, v. 14, p. 252.

Vested rights to use of water for mining, &c.; right of way for canals.

26 July, 1866, c. 262, s. 9, v. 14, p. 252.

Patents, pre-emption, and homesteads subject to vested and accrued water rights.

9 July, 1870, c. 235, s. 17, v. 16, p. 218.

Mineral lands in which no valuable mines are discovered open to homesteads.

26 July, 1866, c. 262, s. 10, v. 14, p. 253.

Mineral lands, how set apart as agricultural lands.

26 July, 1866, c. 262, s. 11, v. 14, p. 253.

SEC. 2338. As a condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.

SEC. 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

SEC. 2340. All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section.

SEC. 2341. Wherever, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, the settlers or owners of such homesteads shall have a right of preemption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty acres; or they may avail themselves of the provisions of chapter five of this Title, relating to "Homesteads."

SEC. 2342. Upon the survey of the lands described in the preceding section, the Secretary of the Interior may designate and set apart such portions of the same as are clearly agricultural lands, which lands shall thereafter be subject to pre-emption and sale as other public lands, and

be subject to all the laws and regulations applicable to the same.

SEC. 2343. The President is authorized to establish additional land-districts, and to appoint the necessary officers under existing laws, wherever he may deem the same necessary for the public convenience in executing the provisions of this chapter.

Additional land districts and officers, power of the President to provide.

26 July, 1866, c. 262, s. 7, v. 14, p. 252.

SEC. 2344. Nothing contained in this chapter shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws; nor to affect the provisions of the act entitled "An act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada," approved July twenty-five, eighteen hundred and sixty-six.

Provisions of this chapter not to affect certain rights.

10 May, 1872, c. 152, s. 16, v. 17, p. 96.

9 July, 1870, c. 235, s. 17, v. 16, p. 218.

SEC. 2345. The provisions of the preceding sections of this chapter shall not apply to the mineral lands situated in the States of Michigan, Wisconsin, and Minnesota, which are declared free and open to exploration and purchase, according to legal subdivisions, in like manner as before the tenth day of May, eighteen hundred and seventy-two. And any bona-fide entries of such lands within the States named since the tenth day of May, eighteen hundred and seventy-two, may be patented without reference to any of the foregoing provisions of this chapter. Such lands shall be offered for public sale in the same manner, at the same minimum price, and under the same rights of pre-emption as other public lands.

Mineral lands in certain States excepted.

18 Feb., 1873, c. 159, v. 17, p. 465.

SEC. 2346. No act passed at the first session of the Thirty-eighth Congress, granting lands to States or corporations to aid in the construction of roads or for other purposes, or to extend the time of grants made prior to the thirtieth day of January, eighteen hundred and sixty-five, shall be so construed as to embrace mineral lands, which in all cases are reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant.

Grant of lands to States or corporations not to include mineral lands.

30 Jan., 1865, Res. No. 10, v. 13, p. 567.

ACTS OF CONGRESS PASSED SUBSEQUENT TO THE REVISED STATUTES.

AN ACT to amend the act entitled "An act to promote the development of the mining resources of the United States," passed May tenth, eighteen hundred and seventy-two.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the fifth section of the act entitled "An act to promote the development of the mining resources of the United States," passed May tenth, eighteen hundred and seventy-two, which requires expenditures of labor and improvements on claims located prior to the passage of said act, are hereby so amended that the time for the first annual expenditure on claims located prior to the passage of said act shall be extended to the first day of January, eighteen hundred and seventy-five.

Claim located prior to May 10, 1872, first annual expenditure extended to Jan. 1, 1875.

Act of Congress appd. June 6, 1874 (18 Stat. L., 61).

AN ACT to amend section two thousand three hundred and twenty-four of the Revised Statutes, relating to the development of the mining resources of the United States.

Money expended in a tunnel considered as expended on the lode.

Act of Congress approved February 11, 1875 (18 Stat. L., 315).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section two thousand three hundred and twenty-four of the Revised Statutes, be, and the same is hereby, amended so that where a person or company has or may run a tunnel for the purpose of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since the passage of said act; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by said act.

AN ACT to exclude the States of Missouri and Kansas from the provisions of the act of Congress entitled "An act to promote the development of the mining resources of the United States," approved May tenth, eighteen hundred and seventy-two.

Missouri and Kansas excluded from the operation of the mineral laws.

Act of Congress approved May 5, 1876 (19 Stat. L., 52).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That within the States of Missouri and Kansas deposits of coal, iron, lead, or other mineral be, and they are hereby, excluded from the operation of the act entitled "An act to promote the development of the mining resources of the United States," approved May tenth, eighteen hundred and seventy-two, and all lands in said States shall be subject to disposal as agricultural lands.

AN ACT authorizing the citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes.

Citizens of Colorado, Nevada, and the Territories authorized to fell and remove timber on the public domain for mining and domestic purposes.

Act of Congress approved June 3, 1878 (20 Stat. L., 88).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all citizens of the United States and other persons, bona fide residents of the State of Colorado, or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided,* The provisions of this act shall not extend to railroad corporations.

SEC. 2. That it shall be the duty of the register and the

receiver of any local land office in whose district any mineral land may be situated to ascertain from time to time whether any timber is being cut or used upon any such lands, except for the purposes authorized by this act, within their respective land districts; and, if so, they shall immediately notify the Commissioner of the General Land Office of that fact; and all necessary expenses incurred in making such proper examinations shall be paid and allowed such register and receiver in making up their next quarterly accounts.

SEC. 3. Any person or persons who shall violate the provisions of this act, or any rules and regulations in pursuance thereof made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding five hundred dollars, and to which may be added imprisonment for any term not exceeding six months.

AN ACT to amend sections twenty-three hundred and twenty-four and twenty-three hundred and twenty-five of the Revised Statutes of the United States concerning mineral lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section twenty-three hundred and twenty-five of the Revised Statutes of the United States be amended by adding thereto the following words: "*Provided, That where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits: And provided, That this section shall apply to all applications now pending for patents to mineral lands.*"

Application for patent may be made by authorized agent.

SEC. 2. That section twenty-three hundred and twenty-four of the Revised Statutes of the United States be amended by adding the following words: "*Provided, That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May, anno Domini eighteen hundred and seventy-two.*"

On unpatented claims period commences on Jan. 1 succeeding date of location.

Act of Congress approved Jan. 22, 1880 (21 Stat. L., 61).

AN ACT to amend section twenty-three hundred and twenty-six of the Revised Statutes relating to suits at law affecting the title to mining-claims.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be

In action brought title not established in either party.

Act of Congress approved March 3, 1881 (21 Stat. L., 505).

entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to a patent for the ground in controversy until he shall have perfected his title.

AN ACT to amend section twenty-three hundred and twenty-six of the Revised Statutes, in regard to mineral lands, and for other purposes.

Adverse claim may be verified by agent.

Sec. 1, act of Congress approved April 26, 1882 (22 Stat. L., 49).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the adverse claim required by section twenty-three hundred and twenty-six of the Revised Statutes may be verified by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated; and the adverse claimant, if residing or at the time being beyond the limits of the district wherein the claim is situated, may make oath to the adverse claim before the clerk of any court of record of the United States or the State or Territory where the adverse claimant may then be, or before any notary public of such State or Territory.

Affidavit of citizenship; before whom made.

Sec. 2, act of Congress approved April 26, 1882 (22 Stat. L., 49).

SEC. 2. That applicants for mineral patents, if residing beyond the limits of the district wherein the claim is situated, may make any oath or affidavit required for proof of citizenship before the clerk of any court of record, or before any notary public of any State or Territory.

AN ACT to exclude the public lands in Alabama from the operation of the laws relating to mineral lands.

Alabama excepted from the operation of the mineral laws.

Act of Congress approved March 3, 1883 (22 Stat. L., 487).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That within the State of Alabama all public lands, whether mineral or otherwise, shall be subject to disposal only as agricultural lands: *Provided, however,* That all lands which have heretofore been reported to the General Land Office as containing coal and iron shall first be offered at public sale: *And provided further,* That any bona fide entry under the provisions of the homestead law of lands within said State heretofore made may be patented without reference to an act approved May tenth, eighteen hundred and seventy-two, entitled "An act to promote the development of the mining resources of the United States," in cases where the persons making application for such patents have in all other respects complied with the homestead law relating thereto.

AN ACT providing a civil government for Alaska.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, * * **

Mining laws extended to the district of Alaska.

Act of Congress approved May 17, 1884 (23 Stat. L., 24).

SEC. 8. That the said district of Alaska is hereby created a land district, and a United States land office for said district is hereby located at Sitka. The commissioner provided for by this act to reside at Sitka shall be ex officio register of said land office, and the clerk provided for by

this act shall be ex officio receiver of public moneys, and the marshal provided for by this act shall be ex officio surveyor-general of said district, and the laws of the United States relating to mining claims, and the rights incident thereto, shall, from and after the passage of this act, be in full force and effect in said district, under the administration thereof herein provided for, subject to such regulations as may be made by the Secretary of the Interior, approved by the President: *Provided*, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress: *And provided further*, That parties who have located mines or mineral privileges therein under the laws of the United States applicable to the public domain, or who have occupied and improved or exercised acts of ownership over such claims, shall not be disturbed therein, but shall be allowed to perfect their title to such claims by payment as aforesaid: *And provided also*, That the land not exceeding six hundred and forty acres at any station now occupied as missionary stations among the Indian tribes in said section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which said missionary stations respectively belong until action by Congress. But nothing contained in this act shall be construed to put in force in said district the general land laws of the United States.

* * * * *

AN ACT making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, * * *

No person who shall after the passage of this act, enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry or settlement, is validated by this act: *Provided*, That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States. * * *

Right of entry under all the land laws restricted to 320 acres. (Repealed, see act March 3, 1891, sec. 17.) Reservation in patents for right of way for ditches and canals constructed.

Act of Congress approved August 30, 1890. (26 Stat. L., 371.)

AN ACT to repeal the timber-culture laws, and for other purposes.

Town sites on mineral lands authorized.

Lands entered under the mineral laws not included in restriction to 320 acres.

Act of Congress approved March 3, 1891 (26 Stat. L., 1095).

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, * * **

SEC. 16. That town-site entries may be made by incorporated towns and cities on the mineral lands of the United States, but no title shall be acquired by such towns or cities to any vein of gold, silver, cinnabar, copper, or lead, or to any valid mining claim or possession held under existing law. When mineral veins are possessed within the limits of an incorporated town or city, and such possession is recognized by local authority or by the laws of the United States, the title to town lots shall be subject to such recognized possession and the necessary use thereof and when entry has been made or patent issued for such town sites to such incorporated town or city, the possessor of such mineral vein may enter and receive patent for such mineral vein, and the surface ground appertaining thereto: *Provided*, That no entry shall be made by such mineral-vein claimant for surface ground where the owner or occupier of the surface ground shall have had possession of the same before the inception of the title of the mineral-vein applicant.

SEC. 17. That reservoir sites located or selected and to be located and selected under the provisions of "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes," and amendments thereto, shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs, excluding so far as practicable lands occupied by actual settlers at the date of the location of said reservoirs and that the provisions of "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for other purposes," which reads as follows, viz: "no person who shall after the passage of this act enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate under all said laws," shall be construed to include in the maximum amount of lands the title to which is permitted to be acquired by one person only agricultural lands and not include lands entered or sought to be entered under mineral land laws.

* * * * *

AN ACT to authorize the entry of lands chiefly valuable for building stone under the placer mining laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer-mineral claims: *Provided*, That lands reserved for the benefit of the public schools or donated to any State shall not be subject to entry under this act.

Entry of lands chiefly valuable for building stone under the placer-mining laws.

Act of Congress approved August 4, 1892 (27 Stat. L., 348).

AN ACT to amend section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States, relating to mining claims.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States, which require that on each claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, be suspended for the year eighteen hundred and ninety-three, so that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for nonperformance of the annual assessment for the year eighteen hundred and ninety-three: *Provided*, That the claimant or claimants of any mining location, in order to secure the benefits of this act shall cause to be recorded in the office where the location notice or certificate is filed on or before December thirty-first, eighteen hundred and ninety-three, a notice that he or they, in good faith intend to hold and work said claim: *Provided, however*, That the provisions of this act shall not apply to the State of South Dakota.

Requirement of proof of expenditure for the year 1893 suspended except as to South Dakota.

Act of Congress approved Nov. 3, 1893 (28 Stat. L., 6).

This act shall take effect from and after its passage.

AN ACT to amend section numbered twenty-three hundred and twenty-four of Revised Statutes of the United States relating to mining claims.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States, which require that on each claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, be suspended for the year eighteen hundred and ninety-four, so that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be

Requirement of proof of expenditure for the year 1894 suspended except as to South Dakota.

Act of Congress approved July 18, 1894 (28 Stat. L., 114).

subject to forfeiture for nonperformance of the annual assessment for the year eighteen hundred and ninety-four: *Provided*, That the claimant or claimants of any mining location, in order to secure the benefits of this act, shall cause to be recorded in the office where the location notice or certificate is filed, on or before December thirty-first, eighteen hundred and ninety-four, a notice that he or they in good faith intend to hold and work said claim: *Provided, however*, That the provisions of this act shall not apply to the State of South Dakota.

SEC. 2. That this act shall take effect from and after its passage.

AN ACT to authorize the entry and patenting of lands containing petroleum and other mineral oils under the placer mining laws of the United States.

Entry and patenting of lands containing petroleum and other mineral oils under the placer mining laws.

Act of Congress approved February 11, 1897. (29 Stat. L., 526).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: *Provided*, That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this act the same as if such filing, claim, or improvement were subsequent to the date of the passage hereof.

AN ACT making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes. (30 Stat., 34, 35, 36).

Vol. 26, p. 1095.

All public lands heretofore designated and reserved by the President of the United States under the provisions of the act approved March third, eighteen hundred and ninety-one, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as public forest reserves under said act, shall be as far as practicable controlled and administered in accordance with the following provisions:

Forest reservations, when to be established.

No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

* * * * *

The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by bona fide settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such reservations may be located.

Use of timber, etc., by settlers, etc.

Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of the Interior. Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering such forest reservations.

Egress and ingress of settlers within reservations, etc.

* * * * *

Upon the recommendation of the Secretary of the Interior, with the approval of the President, after sixty days' notice thereof, published in two papers of general circulation in the State or Territory wherein any forest reservation is situated, and near the said reservation, any public lands embraced within the limits of any forest reservation which, after due examination by personal inspection of a competent person appointed for that purpose by the Secretary of the Interior, shall be found better adapted for mining or for agricultural purposes than for forest usage, may be restored to the public domain. And any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained.

Restoration of mineral or agricultural lands to the public domain.

AN ACT extending the homestead laws and providing for right of way for railroads in the district of Alaska, and for other purposes.

SEC. 13. That native-born citizens of the Dominion of Canada shall be accorded in said district of Alaska the same mining rights and privileges accorded to citizens of the United States in British Columbia and the Northwest Territory by the laws of the Dominion of Canada or the local laws, rules, and regulations; but no greater rights shall be thus accorded than citizens of the United States, or persons who have declared their intention to become such, may enjoy in said district of Alaska; and the Secre-

Mining rights in Alaska to native-born citizens of the Dominion of Canada.

Act of Congress approved May 14, 1898 (30 Stat. L.).

tary of the Interior shall from time to time promulgate and enforce rules and regulations to carry this provision into effect.

AN ACT making further provisions for a civil government for Alaska, and for other purposes.

Act of Congress approved June 6, 1900 (31 Stat., 321-326-330).

District divided into three recording divisions.

SEC. 13. The judges of the district, or a majority of them, shall, as soon as practicable after their appointment, meet, and by appropriate order, to be thereafter entered in each division of the court, divide the district into three recording divisions, designate the division of the court to supervise each, and also define the boundaries thereof by reference to natural objects and permanent landmarks or monuments, in such manner that the boundaries of each recording division can be readily determined and become generally known from such description, which order shall be given publicity in such manner, by posting, publication, or otherwise, as the judges or any division of the court may direct, the necessary expense of the publication of such order and description of the recording divisions to be allowed and paid as other court expenses.

Recording districts.

At any regular or special term an order may be made by the court establishing one or more recording districts within the recording division under the supervision of such division of the court and defining the boundaries thereof by reference to natural objects and permanent landmarks or monuments, in such manner that the boundaries thereof can be readily determined.

—recorder.

The order establishing a recording district shall designate a commissioner to be ex officio recorder thereof, and shall also designate the place where the commissioner shall keep his recording office within the recording district:

Proviso.
—of what clerk of the court shall be ex officio recorder.

Provided, The clerk of the court shall be ex officio recorder of all that portion of the recording division under the supervision of his division of the court not embraced within the limits of a recording district established, bounded, and described therein as authorized by this act, and when any part of the division for which a clerk has been recording shall be embraced in a recording district, such clerk shall transcribe that portion of his records appertaining to such district and deliver the same to the commissioner designated as recorder thereof.

Change of districts, etc.

Whenever it appears to the satisfaction of the court that the public interests demand, or that the convenience of the people require, the court may change or modify the boundaries or discontinue a recording district or change the location of a recording office, or remove the commissioner acting as ex officio recorder, and appoint another commissioner to fill the office.

Record books, etc.

SEC. 14. The clerk as ex officio recorder must procure such books for records as the business of his office requires and such as may be required by the respective commissioners designated as recorders in his division of the court, but orders for the same must first be obtained

from the court or the judge thereof. The respective officers acting as ex officio recorders shall have the custody and must keep all the books, records, maps, and papers deposited in their respective offices, and where a recorder is removed or from any cause becomes unable to act, or a recording district is discontinued, the records and all books, papers, and property relating thereto shall be delivered to the clerk or such officer or person as the court or judge thereof may direct.

The record books procured by the clerk, as herein provided, shall be paid for by him, on the order of the court, out of any moneys in his hands, as other court expenses are paid.

SEC. 15. The respective recorders shall, upon the payment of the fees for the same prescribed by the Attorney-General, record separately, in large and well-bound separate books, in fair hand:

What recorded.

First. Deeds, grants, transfers, contracts to sell or convey real estate and mortgages of real estate, releases of mortgages, powers of attorney, leases which have been acknowledged or proved, mortgages upon personal property;

Second. Certificates of marriage and marriage contracts and births and deaths;

Third. Wills devising real estate admitted to probate;

Fourth. Official bonds;

Fifth. Transcripts of judgments which by law are made liens upon real estate;

Sixth. All orders and judgments made by the district court or the commissioners in probate matters affecting real estate which are required to be recorded;

Seventh. Notices and declaration of water rights;

Eighth. Assignments for the benefit of creditors;

Ninth. Affidavits of annual work done on mining claims;

Tenth. Notices of mining location and declaratory statements;

Eleventh. Such other writings as are required or permitted by law to be recorded, including the liens of mechanics, laborers, and others: *Provided*, Notices of location of mining claims shall be filed for record within ninety days from the date of the discovery of the claim described in the notice, and all instruments shall be recorded in the recording district in which the property or subject-matter affected by the instrument is situated, and where the property or subject-matter is not situated in any established recording district the instrument affecting the same shall be recorded in the office of the clerk of the division of the court having supervision over the recording division in which such property or subject-matter is situated.

Proviso.
Mining claims.

Where instruments recorded.

SEC. 16. Any clerk or commissioner authorized to record any instrument who having collected fees for so doing fails to record such instrument shall account to his successor in office, or to such person as the court may direct, for all the fees received by him for recording any instrument on

Accounting for fees for unrecorded instruments.
—penalty.

file and unrecorded at the expiration of his official term, or at the time he is required to transfer his records to another officer under the direction of the court. And any clerk or commissioner who fails, neglects, or refuses to so account for fees received and not actually earned by the recording of instrument shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than one hundred dollars nor more than one thousand dollars, and imprisoned for not more than one year, or until the fees received and unearned as aforesaid shall have been properly accounted for and paid over by him, as hereinbefore provided. And in addition such fees may be recovered from such clerk or commissioner or the bondsmen of either, in a civil action which shall be brought by the district attorney, in the name of the United States, to recover the same; and the amount when recovered shall be by the court transferred to the successor in office of such recorder, who shall thereupon proceed to record the unrecorded instruments: *Provided*, Miners in any organized mining district may make rules and regulations governing the recording of notices of location of mining claims, water rights, flumes and ditches, mill sites and affidavits of labor, not in conflict with this act or the general laws of the United States; and nothing in this act shall be construed so as to prevent the miners in any regularly organized mining district not within any recording district established by the court from electing their own mining recorder to act as such until a recorder therefor is appointed by the court: *Provided further*, All records heretofore regularly made by the United States commissioner at Dyca, Skagway, and the recorder at Douglas City, not in conflict with any records regularly made with the United States commissioner at Juneau, are hereby legalized. And all records heretofore made in good faith in any regularly organized mining district are hereby made public records, and the same shall be delivered to the recorder for the recording district including such mining district within six months from the passage of this act.

Proviso.
Miners regula-
tions for record-
ing, etc.
—recorder.

Records at
Dyca, etc., legal-
ized.

Mining laws.

Provisos.
Gold, etc. Ex-
plorations on
Bering Sea.

—miners' regula-
tions.

SEC. 26. The laws of the United States relating to mining claims, mineral locations, and rights incident thereto are hereby extended to the district of Alaska: *Provided*, That subject only to such general limitations as may be necessary to exempt navigation from artificial obstructions all land and shoal water between low and mean high tide on the shores, bays, and inlets of Bering Sea, within the jurisdiction of the United States, shall be subject to exploration and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intentions to become such, under such reasonable rules and regulations as the miners in organized mining districts may have heretofore made or may hereafter make governing the temporary possession thereof for exploration and mining purposes until otherwise provided

by law: *Provided further*, That the rules and regulations established by the miners shall not be in conflict with the mining laws of the United States; and no exclusive permits shall be granted by the Secretary of War authorizing any person or persons, corporation or company to excavate or mine under any of said waters below low tide, and if such exclusive permit has been granted it is hereby revoked and declared null and void; but citizens of the United States or persons who have legally declared their intention to become such shall have the right to dredge and mine for gold or other precious metals in said waters, below low tide, subject to such general rules and regulations as the Secretary of War may prescribe for the preservation of order and the protection of the interests of commerce; such rules and regulations shall not, however, deprive miners on the beach of the right hereby given to dump tailings into or pump from the sea opposite their claims, except where such dumping would actually obstruct navigation; and the reservation of a roadway sixty feet wide, under the tenth section of the Act of May fourteenth, eighteen hundred and ninety-eight, entitled "An Act extending the homestead laws and providing for right of way for railroads in the district of Alaska, and for other purposes," shall not apply to mineral lands or town sites.

—not to conflict with Federal laws.

Exclusive permits to mine gold, etc.

Provision reserving roadway, etc., not to apply. Vol. 30, p. 413.

SEC. 27. The Indians or persons conducting schools or missions in the district shall not be disturbed in the possession of any lands now actually in their use or occupation, and the land, at any station not exceeding six hundred and forty acres, now occupied as missionary stations among the Indian tribes in the section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which the missionary stations respectively belong, and the Secretary of the Interior is hereby directed to have such lands surveyed in compact form as nearly as practicable and patents issued for the same to the several societies to which they belong; but nothing contained in this Act shall be construed to put in force in the district the general land laws of the United States.

Occupants of school or mission lands not to be disturbed. —missionary stations.

General land laws not to apply.

AN ACT extending the mining laws to saline lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all unoccupied public lands of the United States containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, are hereby declared to be subject to location and purchase under the provisions of the law relating to placer-mining claims: *Provided*, That the same person shall not locate or enter more than one claim hereunder.

Mining laws extended to saline lands.

Act of Congress approved Jan. 31, 1901 (31 Stat., 145).

REGULATIONS.

NATURE AND EXTENT OF MINING CLAIMS.

1. Mining claims are of two distinct classes: Lode claims and placers.

LODE CLAIMS.

2. The status of lode claims located or patented previous to the 10th day of May, 1872, is not changed with regard to their extent along the lode or width of surface; but the claim is enlarged by sections 2322 and 2328, by investing the locator, his heirs or assigns, with the right to follow, upon the conditions stated therein, all veins, lodes, or ledges, the top or apex of which lies inside of the surface lines of his claim.

3. It is to be distinctly understood, however, that the law limits the possessory right to veins, lodes, or ledges, *other* than the one named in the original location, to such as were not *adversely claimed on May 10, 1872*, and that where such other vein or ledge was so adversely claimed at that date the right of the party so adversely claiming is in no way impaired by the provisions of the Revised Statutes.

4. From and after the 10th May, 1872, any person who is a citizen of the United States, or who has declared his intention to become a citizen, may locate, record, and hold a mining claim of *fifteen hundred linear feet* along the course of any mineral vein or lode subject to location; or an association of persons, severally qualified as above, may make joint location of such claim of *fifteen hundred feet*, but in no event can a location of a vein or lode made after the 10th day of May, 1872, exceed fifteen hundred feet along the course thereof, whatever may be the number of persons composing the association.

5. With regard to the extent of surface ground adjoining a vein or lode, and claimed for the convenient working thereof, the Revised Statutes provide that the lateral extent of locations of veins or lodes made after May 10, 1872, shall in no case *exceed three hundred feet on each side of the middle of the vein at the surface*, and that no such surface rights shall be limited by any mining regulations to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th May, 1872, may render such limitation necessary; the end lines of such claims to be in all cases parallel to each other. Said lateral measurements can not extend beyond three hundred feet on *either* side of the middle of the vein at the surface, or such distance as is allowed by local laws. For example: 400 feet can not be taken on one side and 200 feet on the other. If, however, 300 feet on each side are allowed, and by reason of prior claims but 100 feet can be taken on one side, the locator will not be restricted to less than 300 feet on the other side; and when the locator does not determine by exploration *where* the middle of the vein at the surface is, his discovery shaft must be assumed to mark such point.

6. By the foregoing it will be perceived that no lode claim located after the 10th May, 1872, can exceed a parallelogram fifteen hundred feet in length by six hundred feet in width, but whether surface ground of that width can be taken depends upon the local regulations or State or Territorial laws in force in the several mining districts; and that no such local regulations or State or Territorial laws shall limit a vein or

lode claim to less than fifteen hundred feet along the course thereof, whether the location is made by one or more persons, nor can surface rights be limited to less than fifty feet in width unless adverse claims existing on the 10th day of May, 1872, render such lateral limitation necessary.

7. Locators can not exercise too much care in defining their locations at the outset, inasmuch as the law requires that all records of mining locations made subsequent to May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a *description of the claim or claims* located, by reference to some natural object or permanent monument, as will identify the claim.

8. No lode claim shall be located until after the discovery of a vein or lode within the limits of the claim, the object of which provision is evidently to prevent the appropriation of presumed mineral ground for speculative purposes, to the exclusion of *bona fide* prospectors, before sufficient work has been done to determine whether a vein or lode really exists.

9. The claimant should, therefore, prior to locating his claim, unless the vein can be traced upon the surface, sink a shaft or run a tunnel or drift to a sufficient depth therein to discover and develop a mineral-bearing vein, lode, or crevice; should determine, if possible, the general course of such vein in either direction from the point of discovery, by which direction he will be governed in marking the boundaries of his claim on the surface. His location notice should give the course and distance as nearly as practicable from the discovery shaft on the claim to some permanent, well-known points or objects, such, for instance, as stone monuments, blazed trees, the confluence of streams, point of intersection of well-known gulches, ravines, or roads, prominent buttes, hills, etc., which may be in the immediate vicinity, and which will serve to perpetuate and fix the *locus* of the claim and render it susceptible of identification from the description thereof given in the record of locations in the district, and should be duly recorded.

10. In addition to the foregoing data, the claimant should state the names of adjoining claims, or, if none adjoin, the relative positions of the nearest claims; should drive a post or erect a monument of stones at each corner of his surface ground, and at the point of discovery or discovery shaft should fix a post, stake, or board, upon which should be designated the name of the lode, the name or names of the locators, the number of feet claimed, and in which direction from the point of discovery; it being essential that the location notice filed for record, in addition to the foregoing description, should state whether the entire claim of fifteen hundred feet is taken on one side of the point of discovery, or whether it is partly upon one and partly upon the other side thereof, and in the latter case, how many feet are claimed upon each side of such discovery point.

11. The location notice must be filed for record in all respects as required by the State or Territorial laws and local rules and regulations, if there be any.

12. In order to hold the possessory title to a mining claim located prior to May 10, 1872, the law requires that *ten dollars* shall be expended annually in labor or improvements for each *one hundred feet* in length along the vein or lode. In order to hold the possessory right to a location made since May 10, 1872, not less than one hundred dollars' worth of labor must be performed or improvements made

thereon annually. Under the provisions of the act of Congress approved January 22, 1880, the first annual expenditure becomes due and must be performed during the calendar year succeeding that in which the location was made. Where a number of claims are held in common, the aggregate expenditure that would be necessary to hold all the claims, may be made upon any one claim.

13. Failure to make the expenditure or perform the labor required upon a location made before or since May 10, 1872, will subject a claim to relocation, unless the original locator, his heirs, assigns, or legal representatives have resumed work after such failure and before relocation.

14. Annual expenditure is not required subsequent to entry, the date of issuing the patent certificate being the date contemplated by statute.

15. Upon the failure of any one of several coowners to contribute his proportion of the required expenditures, the coowners, who have performed the labor or made the improvements as required, may, at the expiration of the year, give such delinquent coowner personal notice in writing, or notice by publication in the newspaper published nearest the claim for at least once a week for ninety days; and if upon the expiration of ninety days after such notice in writing, or upon the expiration of one hundred and eighty days after the first newspaper publication of notice, the delinquent coowner shall have failed to contribute his proportion to meet such expenditures or improvements, his interest in the claim by law passes to his coowners who have made the expenditures or improvements as aforesaid. Where a claimant alleges ownership of a forfeited interest under the foregoing provision, the sworn statement of the publisher as to the facts of publication, giving dates and a printed copy of the notice published, should be furnished, and the claimant must swear that the delinquent coowner failed to contribute his proper proportion within the period fixed by the statute.

TUNNELS.

16. The effect of section 2323, Revised Statutes, is to give the proprietors of a mining tunnel run in good faith the possessory right to fifteen hundred feet of any blind lodes cut, discovered, or intersected by such tunnel, which were not previously known to exist, within three thousand feet from the face or point of commencement of such tunnel, and to prohibit other parties, after the commencement of the tunnel, from prospecting for and making locations of lodes on the *line thereof* and within said distance of three thousand feet, unless such lodes appear upon the surface or were previously known to exist. The term "face," as used in said section, is construed and held to mean the first working face formed in the tunnel, and to signify the point at which the tunnel actually enters cover; it being from this point that the three thousand feet are to be counted upon which prospecting is prohibited as aforesaid.

17. To avail themselves of the benefits of this provision of law, the proprietors of a mining tunnel will be required, at the time they enter cover as aforesaid, to give proper notice of their tunnel location by erecting a substantial post, board, or monument at the face or point of commencement thereof, upon which should be posted a good and sufficient notice, giving the names of the parties or company claiming the tunnel right; the actual or proposed course or direction of the tunnel; the height and width thereof, and the course and distance from such face or point of commencement to some permanent well-known

objects in the vicinity by which to fix and determine the locus in manner heretofore set forth applicable to locations of veins or lodes, and at the time of posting such notice they shall, in order that miners or prospectors may be enabled to determine whether or not they are within the lines of the tunnel, establish the boundary lines thereof, by stakes or monuments placed along such lines at proper intervals, to the terminus of the three thousand feet from the face or point of commencement of the tunnel, and the lines so marked will define and govern as to the specific boundaries within which prospecting for lodes not previously known to exist is prohibited while work on the tunnel is being prosecuted with reasonable diligence.

18. At the time of posting notice and marking out the lines of the tunnel as aforesaid, a full and correct copy of such notice of location defining the tunnel claim must be filed for record with the mining recorder of the district, to which notice must be attached the sworn statement or declaration of the owners, claimants, or projectors of such tunnel, setting forth the facts in the case; stating the amount expended by themselves and their predecessors in interest in prosecuting work thereon; the extent of the work performed, and that it is *bona fide* their intention to prosecute work on the tunnel so located and described with reasonable diligence for the development of a vein or lode, or for the discovery of mines, or both, as the case may be. This notice of location must be duly recorded, and, with the said sworn statement attached, kept on the recorder's files for future reference.

PLACER CLAIMS.

19. But one discovery of mineral is required to support a placer location, whether it be of twenty acres by an individual, or of one hundred and sixty acres or less by an association of persons.

20. The act of August 4, 1892, extends the mineral-land laws so as to bring lands chiefly valuable for building stone within the provisions of said law by authorizing a placer entry of such lands. Registers and receivers should make a reference to said act on the entry papers in the case of all placer entries made for lands containing stone chiefly valuable for building purposes. Lands reserved for the benefit of public schools or donated to any State are not subject to entry under said act.

21. The act of February 11, 1897, provides for the location and entry of public lands chiefly valuable for petroleum or other mineral oils, and entries of that nature made prior to the passage of said act are to be considered as though made thereunder.

22. By section 2330 authority is given for the subdivision of forty-acre legal subdivisions into *ten-acre* lots, which is intended for the greater convenience of miners in segregating their claims both from one another and from intervening agricultural lands. It is held, therefore, that under a proper construction of the law these ten-acre lots in mining districts should be considered and dealt with, to all intents and purposes, as legal subdivisions, and that an applicant having a claim which conforms to one or more of these ten-acre lots, contiguous in case of two or more lots, may make entry thereof, after the usual proceedings, without further survey or plat.

23. In cases of this kind, however, the notice given of the application must be very specific and accurate in description, and as the forty-

acre tracts may be subdivided into ten-acre lots, either in the form of squares of ten by ten chains, or, if parallelograms, five by twenty chains, so long as the lines are parallel and at right angles with the lines of the public surveys, it will be necessary that the notice and application state specifically what ten-acre lots are sought to be patented in addition to the other *data* required in the notice.

24. Where the ten-acre subdivision is in the form of a square it may be described, for instance, as the "SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$," or, if in the form of a parallelogram as aforesaid, it may be described as the "W. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ (or the N. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$) of section —, township —, range —," as the case may be; but, in addition to this description of the land, the notice must give all the other *data* that is required in a mineral application, by which parties may be put on inquiry as to the premises sought to be patented. The proofs submitted with applications for claims of this kind must show clearly the character and the extent of the improvements upon the premises.

25. The proof of improvements must show their value to be not less than *five hundred dollars* and that they were made by the applicant for patent or his grantors. This proof should consist of the affidavit of two or more disinterested witnesses. The annual expenditure to the amount of \$100, required by section 2324, Revised Statutes, must be made upon placer claims as well as lode claims.

26. Applicants for patent to a placer claim, who are also in possession of a known vein or lode included therein, must state in their application that the placer includes such vein or lode. The published and posted notices must also include such statement. If veins or lodes lying within a placer location are owned by other parties, the fact should be distinctly stated in the application for patent, and in all the notices. But in all cases, whether the lode is claimed or excluded, it must be surveyed and marked upon the plat, the field notes and plat giving the area of the lode claim or claims and the area of the placer separately. An application which omits to claim such known vein or lode must be construed as a conclusive declaration that the applicant has no right of possession to the vein or lode. Where there is no known lode or vein, the fact must appear by the affidavit of two or more witnesses.

27. By section 2330 it is declared that no location of a placer claim, made after July 9, 1870, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys.

28. Section 2331 provides that all placer-mining claims located after May 10, 1872, shall conform as nearly as practicable with the United States system of public-land surveys and the rectangular subdivisions of such surveys, and such locations shall not include more than twenty acres for each individual claimant.

29. The foregoing provisions of law are construed to mean that after the 9th day of July, 1870, no location of a placer claim can be made to exceed one hundred and sixty acres, whatever may be the number of locators associated together, or whatever the local regulations of the district may allow; and that from and after May 10, 1872, no location can exceed twenty acres for each individual participating therein; that is, a location by two persons can not exceed forty acres, and one by three persons can not exceed sixty acres.

30. The regulations hereinbefore given as to the manner of marking

locations on the ground, and placing the same on record, must be observed in the case of placer locations so far as the same are applicable, the law requiring, however, that all placer mining claims located after May 10, 1872, shall conform as near as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys, whether the locations are upon surveyed or unsurveyed lands.

REGULATIONS UNDER SALINE ACT.

31. Under the act approved January 31, 1901, extending the mining laws to saline lands, the provisions of the law relating to placer-mining claims are extended to all States and Territories and the district of Alaska, so as to permit the location and purchase thereunder of all unoccupied public lands containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, with the proviso, "That the same person shall not locate or enter more than one claim hereunder."

32. Rights obtained by location under the placer-mining laws are assignable, and the assignee may make the entry in his own name; so, under this act a person holding as assignee may make entry in his own name: *Provided*, He has not held under this act, at any time, either as locator or entryman, any other lands; his right is exhausted by having held under this act any particular tract, either as locator or entryman, either as an individual or as a member of an association. It follows, therefore, that no application for patent or entry, made under this act, shall embrace more than one single location.

33. In order that the conditions imposed by the proviso, as set forth in the above paragraph, may duly appear, the notice of location presented for record and the application for patent must each contain a specific statement under oath by each person whose name appears therein that he never has, either as an individual or as a member of an association, located or entered any other lands under the provisions of this act. Assignments made by persons who are not severally qualified as herein stated will not be recognized.

PROCEDURE TO OBTAIN PATENT TO MINERAL LANDS.

LODE CLAIMS.

34. The claimant is required, in the first place, to have a correct survey of his claim made under authority of the surveyor-general of the State or Territory in which the claim lies, such survey to show with accuracy the exterior surface boundaries of the claim, which boundaries are required to be distinctly marked by monuments on the ground. Four plats and one copy of the original field notes in each case will be prepared by the surveyor-general; one plat and the original field notes to be retained in the office of the surveyor-general, one copy of the plat to be given the claimant for posting upon the claim, one plat and a copy of the field notes to be given the claimant for filing with the proper register, to be finally transmitted by that officer, with other papers in the case, to this office, and one plat to be sent by the surveyor-general to the register of the proper land district, to be retained on his files for future reference. As there is no resident surveyor-general for the State of Arkansas, applications for the survey of mineral claims in said State should be made to the Commissioner of this office, who, under the law, is *ex officio* the U. S. surveyor-general.

35. The survey and plat of mineral claims required to be filed in the proper land office with application for patent must be made subsequent to the recording of the location of the claim (if the laws of the State or Territory or the regulations of the mining district require the notice of location to be recorded), and when the original location is made by survey of a United States deputy surveyor such location survey can not be substituted for that required by the statute, as above indicated.

36. The surveyors-general should designate all surveyed mineral claims by a progressive series of numbers, beginning with survey No. 37, irrespective as to whether they are situated on surveyed or unsurveyed lands, the claim to be so designated at date of issuing the order therefor, in addition to the local designation of the claim; it being required in all cases that the plat and field notes of the survey of a claim must, in addition to the reference to permanent objects in the neighborhood, describe the locus of the claim with reference to the lines of public surveys by a line connecting a corner of the claim with the nearest public corner of the United States surveys, unless such claim be on unsurveyed lands at a distance of more than two miles from such public corner, in which latter case it should be connected with a United States mineral monument. Such connecting line must not be more than *two miles* in length, and should be measured on the ground direct between the points, or calculated from actually surveyed traverse lines if the nature of the country should not permit direct measurement. If a regularly established survey corner is within two miles of a claim situated on unsurveyed lands, the connection should be made with such corner in preference to a connection with a United States mineral monument. The connecting line or traverse line must be surveyed by the deputy mineral surveyor at the time of his making the particular survey, and be made a part thereof.

37. Upon the approval of the survey of a mining claim made upon surveyed lands the surveyor-general will prepare and transmit to the local land office and to this office a diagram made upon the usual drawing paper township blank, showing the portions of legal 40-acre subdivisions made fractional by reason of the mineral survey, designating each of such portions by the proper lot number, beginning with No. 1 in each section, and giving the area of each lot.

38. The following particulars should be observed in the survey of every mining claim:

(1) The exterior boundaries of the claim, the number of feet claimed along the vein, and, as nearly as can be ascertained, the direction of the vein, and the number of feet claimed on the vein in each direction from the point of discovery or other well-defined place on the claim should be represented on the plat of survey and in the field notes.

(2) The intersection of the lines of the survey with the lines of conflicting prior surveys should be noted in the field notes and represented upon the plat.

(3) Conflicts with unsurveyed claims, where the applicant for survey does not claim the area in conflict, should be shown by actual survey.

(4) The total area of the claim embraced by the exterior boundaries should be stated, and also the area in conflict with each intersecting survey, substantially as follows:

	Acres.
Total area of claim	10.50
Area in conflict with survey No. 302.....	1.56
Area in conflict with survey No. 948.....	2.33
Area in conflict with Mountain Maid lode mining claim, unsurveyed	1.48

It does not follow that because mining surveys are required to exhibit all conflicts with prior surveys the areas of conflict are to be excluded. The field notes and plat are made a part of the application for patent, and care should be taken that the description does not inadvertently exclude portions intended to be retained. The application for patent should state the portions to be excluded in express terms.

39. The claimant is then required to post a copy of the plat of such survey in a conspicuous place upon the claim, together with notice of his intention to apply for a patent therefor, which notice will give the date of posting, the name of the claimant, the name of the claim, the number of the survey, the mining district and county, and the names of adjoining and conflicting claims as shown by the plat of survey. Too much care can not be exercised in the preparation of this notice, inasmuch as the data therein are to be repeated in the other notices required by the statute, and upon the accuracy and completeness of these notices will depend, in a great measure, the regularity and validity of the proceedings for patent.

40. After posting the said plat and notice upon the premises, the claimant will file with the proper register and receive a copy of such plat and the field notes of survey of the claim, accompanied by the affidavit of at least two credible witnesses that such plat and notice are posted conspicuously upon the claim, giving the date and place of such posting; a copy of the *notice* so posted to be attached to and form a part of said affidavit.

41. Accompanying the field notes so filed must be the sworn statement of the claimant that he has the possessory right to the premises therein described, in virtue of a compliance by himself (and by his grantors, if he claims by purchase) with the mining rules, regulations, and customs of the mining district, State, or Territory in which the claim lies, and with the mining laws of Congress; such sworn statement to narrate briefly, but as clearly as possible, the facts constituting such compliance, the origin of his possession, and the basis of his claim to a patent.

42. This sworn statement must be supported by a copy of the location notice, certified by the officer in charge of the records where the same is recorded, and where the applicant for patent claims the interests of others associated with him in making the location, or only as purchaser, in addition to the copy of the location notice, must be furnished a complete abstract of title as shown by the record in the office where the transfers are by law required to be recorded, certified to by the officer in charge of the record under his official seal. The officer should also certify that no conveyances affecting the title to the claim in question appear of record other than those set forth in the abstract, which abstract shall be brought down to the date of the application for patent. Where the applicant claims as sole locator and does not furnish an abstract of title, his affidavit should be furnished to the effect that he has disposed of no interest in the land located.

43. In the event of the mining records in any case having been destroyed by fire or otherwise lost, affidavit of the fact should be made, and secondary evidence of possessory title will be received, which may consist of the affidavit of the claimant, supported by those of any other parties cognizant of the facts relative to his location, occupancy, possession, improvements, &c.; and in such case of lost records, any deeds, certificates of location or purchase, or other evidence which may be in the claimant's possession and tend to establish his claim, should be filed.

44. Before receiving and filing a mineral application for patent, local officers will be particular to see that it includes no land which is embraced in a prior or pending application for patent or entry, or for any lands embraced in a railroad selection, or for which publication is pending or has been made by any other claimants, and if, in their opinion, after investigation, it should appear that a mineral application should not, for these or other reasons, be accepted and filed, they should formally reject the same, giving the reasons therefor, and allow the applicant thirty days for appeal to this office under the Rules of Practice.

45. Upon the receipt of these papers, if no reason appears for rejecting the application, the register will, at the expense of the claimant (who must furnish the agreement of the publisher to hold applicant for patent alone responsible for charges of publication), publish a notice of such application for the period of sixty days in a newspaper published nearest to the claim, and will post a copy of such notice in his office for the same period. When the notice is published in a *weekly* newspaper, nine consecutive insertions are necessary; when in a *daily* newspaper, the notice must appear in each issue for sixty-one consecutive issues. In both cases the first day of issue must be excluded in estimating the period of sixty days.

46. The notices so published and posted must embrace all the data given in the notice posted upon the claim. In addition to such data the published notice must further indicate the locus of the claim by giving the connecting line, as shown by the field notes and plat, between a corner of the claim and a United States mineral monument or a corner of the public survey, and thence the boundaries of the claim by courses and distances.

47. The register shall publish the notice of application for patent in a paper of established character and general circulation, to be by him designated as being the newspaper published nearest the land.

48. The claimant at the time of filing the application for patent, or at any time within the sixty days of publication, is required to file with the register, a certificate of the surveyor-general that not less than five hundred dollars' worth of labor has been expended or improvements made, by the applicant or his grantors, upon each location embraced in the application, or if the application embraces several locations held in common, that an amount equal to five hundred dollars for each location, has been so expended upon, and for the benefit of, the entire group; that the plat filed by the claimant is correct; that the field notes of the survey, as filed, furnish such an accurate description of the claim as will if incorporated in a patent serve to fully identify the premises and that such reference is made therein to natural objects or permanent monuments as will perpetuate and fix the locus thereof: *Provided*, That as to all applications for patent made and passed to entry before July 1, 1898, or which are by protests or adverse claims prevented from being passed to entry before that time, where the application embraces several locations held in common, proof of an expenditure of five hundred dollars upon the group will be sufficient and an expenditure of that amount need not be shown to have been made upon, or for the benefit of, each location embraced in the application.

49. The surveyor-general may derive his information upon which to base his certificate as to the value of labor expended or improvements made from his deputy who makes the actual survey and examination

upon the premises, and such deputy should specify with particularity and full detail the character and extent of such improvements.

50. It will be the more convenient way to have this certificate indorsed by the surveyor-general, both upon the plat and field notes of survey filed by the claimant as aforesaid.

51. After the sixty days' period of newspaper publication has expired, the claimant will furnish from the office of publication a sworn statement that the notice was published for the statutory period, giving the first and last day of such publication, and his own affidavit showing that the plat and notice aforesaid remained conspicuously posted upon the claim sought to be patented during said sixty days' publication, giving the dates.

52. Upon the filing of this affidavit the register will, if no adverse claim was filed in his office during the period of publication, permit the claimant to pay for the land according to the area given in the plat and field notes of survey aforesaid, at the rate of five dollars for each acre and five dollars for each fractional part of an acre, except as otherwise provided by law, the receiver issuing the usual duplicate receipt therefor. The claimant will also make a sworn statement of all charges and fees paid by him for publication and surveys, together with all fees and money paid the register and receiver of the land office, after which the complete record will be forwarded to the Commissioner of the General Land Office and a patent issued thereon if found regular.

53. At any time prior to the issuance of patent, protest may be filed against the patenting of the claim as applied for, upon any ground tending to show that the applicant has failed to comply with the law in a matter which would avoid the claim. Such protest can not, however, be made the means of preserving a surface conflict lost by failure to adverse or lost by the judgment of the court in an adverse suit. One holding a present joint interest in a mineral location included in an application for patent who is excluded from the application, so that his interest would not be protected by the issue of patent thereon, may protest against the issuance of a patent as applied for, setting forth in such protest the nature and extent of his interest in such location, and such a protestant will be deemed a party in interest entitled to appeal. This results from the holding that a coowner excluded from an application for patent does not have an "adverse" claim within the meaning of sections 2325 and 2326 of the Revised Statutes. See *Turner v. Sawyer*, 150 U. S., 578-586.

54. Any party applying for patent as *trustee* must disclose fully the nature of the trust and the name of the *cestui que trust*; and such trustee, as well as the beneficiaries, must furnish satisfactory proof of citizenship; and the names of beneficiaries, as well as that of the trustee, must be inserted in the final certificate of entry.

55. The annual expenditure of one hundred dollars in labor or improvements on a mining claim, required by section 2324 of the Revised Statutes, is solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts.

56. The failure of an applicant for patent to a mining claim to prosecute his application to completion, by filing the necessary proofs and making payment for the land, within a reasonable time after the expiration of the period of publication of notice of the application, or after the termination of adverse proceedings in the courts, constitutes

a waiver by the applicant of all rights obtained by the earlier proceedings upon the application.

57. The proceedings necessary to the completion of an application for patent to a mining claim, against which an adverse claim or protest has been filed, if taken by the applicant at the first opportunity afforded therefor under the law and departmental practice, will be as effective as if taken at the date when, but for the adverse claim or protest, the proceedings on the application could have been completed.

PLACER CLAIMS.

58. The proceedings to obtain patents for placer claims, including all forms of mineral deposits excepting veins of quartz or other rock in place, are similar to the proceedings prescribed for obtaining patents for vein or lode claims; but where a placer claim shall be upon surveyed lands, and conforms to legal subdivisions, no further survey or plat will be required. Where placer claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands.

59. The proceedings for obtaining patents for veins or lodes having already been fully given, it will not be necessary to repeat them here, it being thought that careful attention thereto by applicants and the local officers will enable them to act understandingly in the matter, and make such slight modifications in the notice, or otherwise, as may be necessary in view of the different nature of the two classes of claims; placer claims being fixed, however, at two dollars and fifty cents per acre, or fractional part of an acre.

60. In placer applications for patent care must be exercised to determine the proper classification of the lands claimed. To this end the clearest evidence of which the case is capable should be presented.

(1) If the claim be all placer ground, that fact must be stated in the application and corroborated by accompanying proofs; if of mixed placers and lodes, it should be so set out, with a description of all known lodes situated within the boundaries of the claim. A specific declaration, such as is required by section 2333, Revised Statutes, must be furnished as to each lode intended to be claimed. All other known lodes are, by the silence of the applicant, excluded by law from all claim by him, of whatsoever nature, possessory or otherwise.

(2) Deputy surveyors shall, at the expense of the parties, make full examination of all placer claims surveyed by them, and duly note the facts as specified in the law, stating the quality and composition of the soil, the kind and amount of timber and other vegetation, the locus and size of streams, and such other matters as may appear upon the surface of the claim. This examination should include the character and extent of all surface and underground workings, whether placer or lode, for mining purposes.

(3) In addition to these data, which the law requires to be shown in all cases, the deputy should report with reference to the proximity of centers of trade or residence; also of well-known systems of lode deposit or of individual lodes. He should also report as to the use or adaptability of the claim for placer mining; whether water has been brought upon it in sufficient quantity to mine the same, or whether it can be procured for that purpose; and, finally, what works or expenditures have been made by the claimant or his grantors for the development of

the claim, and their situation and location with respect to the same as applied for.

(4) This examination should be reported by the deputy under oath to the surveyor-general, and duly corroborated; and a copy of the same should be furnished with the application for patent to the claim, constituting a part thereof, and included in the oath of the applicant.

(5) Applications awaiting entry, whether published or not, must be made to conform to these regulations, with respect to examination as to the character of the land. Entries already made will be suspended for such additional proofs as may be deemed necessary in each case.

MILL SITES.

61. Land entered as a mill site must be shown to be nonmineral. Mill sites are simply auxiliary to the working of mineral claims, and as section 2337, which provides for the patenting of mill sites, is embraced in the chapter of the Revised Statutes relating to mineral lands, they are therefore included in this circular.

62. To avail themselves of this provision of law parties holding the possessory right to a vein or lode, and to a piece of nonmineral land not contiguous thereto for mining or milling purposes, not exceeding the quantity allowed for such purpose by section 2337, or prior laws, under which the land was appropriated, the proprietors of such vein or lode may file in the proper land office their application for a patent, under oath, in manner already set forth herein, which application, together with the plat and field notes, may include, embrace, and describe, in addition to the vein or lode, such noncontiguous mill site, and after due proceedings as to notice, etc., a patent will be issued conveying the same as one claim. The owner of a patented lode may, by an independent application, secure a mill site if good faith is manifest in its use or occupation in connection with the lode and no adverse claim exists.

63. Where the original survey includes a lode claim and also a mill site the lode claim should be described in the plat and field notes as "Sur. No. 37, A," and the mill site as "Sur. No. 37, B," or whatever may be its appropriate numerical designation; the course and distance from a corner of the mill site to a corner of the lode claim to be invariably given in such plat and field notes, and a copy of the plat and notice of application for patent must be conspicuously posted upon the mill site as well as upon the vein or lode for the statutory period of sixty days. In making the entry no separate receipt or certificate need be issued for the mill site, but the whole area of both lode and mill site will be embraced in one entry, the price being five dollars for each acre and fractional part of an acre embraced by such lode and mill-site claim.

64. In case the owner of a quartz mill or reduction works is not the owner or claimant of a vein or lode the law permits him to make application therefor in the same manner prescribed herein for mining claims, and after due notice and proceedings, in the absence of a valid adverse filing, to enter and receive a patent for his mill site at said price per acre.

65. In every case there must be satisfactory proof that the land claimed as a mill site is not mineral in character, which proof may, where the matter is unquestioned, consist of the sworn statement of two or more persons capable, from acquaintance with the land, to testify understandingly.

CITIZENSHIP.

66. The proof necessary to establish the citizenship of applicants for mining patents must be made in the following manner: In case of an incorporated company, a certified copy of their charter or certificate of incorporation must be filed. In case of an association of persons unincorporated, the affidavit of their duly authorized agent, made upon his own knowledge or upon information and belief, setting forth the residence of each person forming such association, must be submitted. This affidavit must be accompanied by a power of attorney from the parties forming such association, authorizing the person who makes the affidavit of citizenship to act for them in the matter of their application for patent.

67. In case of an individual or an association of individuals who do not appear by their duly authorized agent, you will require the affidavit of each applicant, showing whether he is a native or naturalized citizen, when and where born, and his residence.

68. In case an applicant has declared his intention to become a citizen or has been naturalized, his affidavit must show the date, place, and the court before which he declared his intention, or from which his certificate of citizenship issued, and present residence.

69. The affidavit of the claimant as to his citizenship may be taken before the register or receiver, or any other officer authorized to administer oaths within the land district; or, if the claimant is residing beyond the limits of the district, the affidavit may be taken before the clerk of any court of record or before any notary public of any State or Territory.

70. If citizenship is established by the testimony of disinterested persons, such testimony may be taken at any place before any person authorized to administer oaths, and whose official character is duly verified.

71. No entry will be allowed until the register has satisfied himself, by careful examination, that proper proofs have been filed upon the points indicated in the law and official regulations. Transfers made subsequent to the filing of the application for patent will not be considered, but entry will be allowed and patent issued in all cases in the name of the applicant for patent, the title conveyed by the patent, of course, in each instance inuring to the transferee of such applicant where a transfer has been made pending the application for patent.

72. The consecutive series of numbers of mineral entries must be continued, whether the same are of lode or placer claims or mill sites.

73. In sending up the papers in a case the register must not omit certifying to the fact that the notice was posted in his office for the full period of sixty days, such certificate to state distinctly when such posting was done and how long continued. The plat forwarded as part of the proof should not be *folded*, but *rolled*, so as to prevent creasing, and either transmitted in a separate package or so enclosed with the other papers that it may pass through the mails without creasing or mutilation. If forwarded separately, the letter transmitting the papers should state the fact.

POSSESSORY RIGHT.

74. The provisions of section 2332, Revised Statutes, will greatly lessen the burden of proof, more especially in the case of old claims located many years since, the records of which, in many cases, have been destroyed by fire, or lost in other ways during the lapse of time, but concerning the possessory right to which all controversy or litigation has long been settled.

75. When an applicant desires to make his proof of possessory right in accordance with this provision of law, he will not be required to produce evidence of location, copies of conveyances, or abstracts of title, as in other cases, but will be required to furnish a duly certified copy of the statute of limitation of mining claims for the State or Territory, together with his sworn statement giving a clear and succinct narration of the facts as to the origin of his title, and likewise as to the continuation of his possession of the mining ground covered by his application; the area thereof; the nature and extent of the mining that has been done thereon; whether there has been any opposition to his possession, or litigation with regard to his claim and, if so, when the same ceased; whether such cessation was caused by compromise or by judicial decree, and any additional facts within the claimant's knowledge having a direct bearing upon his possession and bona fides which he may desire to submit in support of his claim.

76. There should likewise be filed a certificate, under seal of the court having jurisdiction of mining cases within the judicial district embracing the claim, that no suit or action of any character whatever involving the right of possession to any portion of the claim applied for is pending, and that there has been no litigation before said court affecting the title to said claim or any part thereof for a period equal to the time fixed by the statute of limitations for mining claims in the State or Territory as aforesaid, other than that which has been finally decided in favor of the claimant.

77. The claimant should support his narrative of facts relative to his possession, occupancy, and improvements by corroborative testimony of any disinterested person or persons of credibility who may be cognizant of the facts in the case and are capable of testifying understandingly in the premises.

ADVERSE CLAIMS.

78. An adverse mining claim must be filed with the register and receiver of the land office where the application for patent was filed, or with the register and receiver of the district in which the land is situated at the time of filing the adverse claim. It must be on the oath of the adverse claimant, or it may be verified by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated.

79. Where an agent or attorney in fact verifies the adverse claim, he must distinctly swear that he is such agent or attorney, and accompany his affidavit by proof thereof.

80. The agent or attorney in fact must make the affidavit in verification of the adverse claim within the land district where the claim is situated.

81. The adverse notice must fully set forth the nature and extent of the interference or conflict; whether the adverse party claims as a purchaser for valuable consideration or as a locator; if the former, a certified copy of the original location, the original conveyance, a duly certified copy thereof, or an abstract of title from the office of the proper recorder should be furnished, or if the transaction was a merely verbal one he will narrate the circumstances attending the purchase, the date thereof, and the amount paid, which facts should be supported by the affidavit of one or more witnesses, if any were present at the time, and if he claims as a locator he must file a duly certified copy of the location from the office of the proper recorder.

82. In order that the "*boundaries*" and "*extent*" of the claim may be shown, it will be incumbent upon the adverse claimant to file a plat showing his entire claim, its relative situation or position with the one against which he claims, and the extent of the conflict: *Provided, however*, That if the application for patent describes the claim by legal subdivisions, the adverse claimant, if also claiming by legal subdivisions, may describe his adverse claim in the same manner without further survey or plat. If the claim is not described by legal subdivisions, it will generally be more satisfactory if the plat thereof is made from an actual survey by a deputy mineral surveyor, and its correctness officially certified thereon by him.

83. Upon the forgoing being filed within the sixty days' publication, the register, or in his absence the receiver, will give notice in writing to *both parties* to the contest that such adverse claim has been filed, informing them that the party who filed the adverse claim will be required within thirty days from the date of such filing to commence proceedings in a court of competent jurisdiction to determine the question of right of possession, and to prosecute the same with reasonable diligence to final judgment, and that, should such adverse claimant fail to do so, his adverse claim will be considered waived, and the application for patent be allowed to proceed upon its merits.

84. When an adverse claim is filed as aforesaid, the register or receiver will indorse upon the same the precise date of filing, and preserve a record of the date of notifications issued thereon; and thereafter all proceedings on the application for patent will be suspended, with the exception of the completion of the publication and posting of notices and plat, and the filing of the necessary proof thereof, until the controversy shall have been adjudicated in court, or the adverse claim waived or withdrawn.

85. Where an adverse claim has been filed and suit thereon commenced within the statutory period, and final judgment rendered determining the right of possession, it will not be sufficient to file with the register a certificate of the clerk of the court, setting forth the facts as to such judgment, but the successful party must, before he is allowed to make entry, file a certified copy of the judgment, together with the other evidence required by section 2326, Revised Statutes.

86. Where such suit has been dismissed, a certificate of the clerk of the court to that effect or a certified copy of the order of dismissal will be sufficient.

87. After an adverse claim has been filed and suit commenced, a relinquishment or other evidence of abandonment of the adverse claim will not be accepted, but the case must be terminated and proof thereof furnished as required by the last two paragraphs.

88. Where an adverse claim has been filed, but no suit commenced against the applicant for patent within the statutory period, a certificate to that effect by the clerk of the State court having jurisdiction in the case, and also by the clerk of the circuit court of the United States for the district in which the claim is situated, will be required.

APPOINTMENT OF DEPUTIES, FOR SURVEY OF MINING CLAIMS—
CHARGES FOR SURVEYS AND PUBLICATIONS—FEES OF REGISTERS
AND RECEIVERS, ETC.

89. Section 2334 provides for the appointment of surveyors to survey mining claims, and authorizes the Commissioner of the General Land Office to establish the rates to be charged for surveys and for newspaper publications. Under this authority of law the following rates have been established as the maximum charges for newspaper publications in mining cases:

(1) Where a daily newspaper is designated the charge shall not exceed seven dollars for each ten lines of space occupied, and where a weekly newspaper is designated as the medium of publication five dollars for the same space will be allowed. Such charge shall be accepted as full payment for publication in each issue of the newspaper for the entire period required by law.

It is expected that these notices shall not be so abbreviated as to curtail the description essential to a perfect notice, and the said rates established upon the understanding that they are to be in the usual body type used for advertisements.

(2) For the publication of citations in contests or hearings involving the character of lands the charges shall not exceed eight dollars for five publications in weekly newspapers or ten dollars for publications in daily newspapers for thirty days.

90. The surveyors-general of the several districts will, in pursuance of said law, appoint in each land district as many *competent* surveyors for the survey of mining claims as may seek such appointment, it being distinctly understood that all expenses of these notices and surveys are to be borne by the mining claimants and not by the United States. The statute provides that the claimant shall also be at liberty to employ any United States deputy surveyor to make the survey. Each surveyor appointed to survey mining claims before entering upon the duties of his office or appointment shall be required to enter into such bond for the faithful performance of his duties as may be prescribed by the regulations of the land department in force at that time.

91. With regard to the *plattin*g of the claim and other *office work* in the surveyor-general's office, that officer will make an estimate of the cost thereof, which amount the claimant will deposit with any assistant United States treasurer or designated depository in favor of the United States Treasurer, to be passed to the credit of the fund created by "individual depositors for surveys of the public lands," and file with the surveyor-general duplicate certificates of such deposit in the usual manner.

92. The surveyors-general will endeavor to appoint surveyors to survey mining claims, so that one or more may be located in each mining district for the greater convenience of miners.

93. The usual oaths will be required of these surveyors and their assistants as to the correctness of each survey executed by them.

The duty of the surveyor ceases when he has executed the survey and returned the field notes and preliminary plat thereof with his report to the surveyor-general. He will not be allowed to prepare for the mining claimant the papers in support of an application for patent, or otherwise perform the duties of an attorney before the land office in connection with a mining claim.

The surveyors-general and local land officers are expected to report any infringement of this regulation to this office.

94. Should it appear that excessive or exorbitant charges have been made by any surveyor or any publisher, prompt action will be taken with the view of correcting the abuse.

95. The fees payable to the register and receiver for filing and acting upon applications for mineral-land patents are five dollars to each officer, to be paid by the applicant for patent at the time of filing, and the like sum of five dollars is payable to each officer by an adverse claimant at the time of filing his adverse claim. (Sec. 2238, R. S., paragraph 9.)

96. At the time of payment of fee for mining application or adverse claim the receiver will issue his receipt therefor in duplicate, one to be given the applicant or adverse claimant, as the case may be, and one to be forwarded to the Commissioner of the General Land Office *on the day of issue*. The receipt for mining application should have attached the certificate of the register that the lands included in the application are subject to such appropriation, as far as shown by the records of his office.

97. The register and receiver will, at the close of each month, forward to this office an abstract of mining applications filed, an abstract of adverse claims filed, an abstract of mineral lands sold, and a report of receipts from such sales.

98. The fees and purchase money received by registers and receivers must be placed to the credit of the United States in the receiver's monthly and quarterly account, charging up in the disbursing account the sums to which the register and receiver may be respectively entitled as fees and commissions, with limitations in regard to the legal maximum.

HEARINGS TO DETERMINE CHARACTER OF LANDS.

99. The Rules of Practice in cases before the United States district land offices, the General Land Office, and the Department of the Interior will, so far as applicable, govern in all cases and proceedings arising in contests and hearings to determine the mineral character of lands.

100. Public land returned by the surveyor-general as mineral shall be withheld from entry as agricultural land until the presumption arising from such a return shall be overcome by testimony taken in the manner hereinafter described.

101. Hearings to determine the character of lands are practically of two kinds, as follows:

(1) Lands returned as mineral by the surveyor-general.

When such lands are sought to be entered as agricultural under laws which require the submission of final proof after due notice by publication and posting, the filing of the proper nonmineral affidavit in the absence of allegations that the land is mineral will be deemed sufficient as a preliminary requirement. A satisfactory showing as to character of land must be made when final proof is submitted.

In case of application to enter, locate, or select such lands as agricultural, under laws in which the submission of final proof after due publication and posting is *not* required, notice thereof must first be given by publication for sixty days and posting in the local office during the same period, and affirmative proof as to the character of the land submitted. In the absence of allegations that the land is mineral, and upon compliance with this requirement, the entry, location, or selection will be allowed, if otherwise regular.

(2) Lands returned as agricultural and alleged to be mineral in character.

Where as against the claimed right to enter such lands as agricultural it is alleged that the same are mineral, or are applied for as mineral lands, the proceedings in this class of cases will be in the nature of a contest, and the practice will be governed by the rules in force in contest cases.

102. Where a railroad company seeks to select lands not returned as mineral, but within six miles of any mining location, claim, or entry, or where in the case of a selection by a State, the lands sought to be selected are within a township in which there is a mining location, claim, or entry, publication must be made of the lands selected at the expense of the railroad company or State for a period of sixty days, with posting for the same period in the land office for the district in which the lands are situated, during which period of publication the local land officers will receive protests or contests for any of said tracts or subdivisions of lands claimed to be more valuable for mining than for agricultural purposes.

103. At the expiration of the period of publication the register and receiver will forward to the Commissioner of the General Land Office the published list, noting thereon any protests, or contests, or suggestions as to the mineral character of any such lands, together with any information they may have received as to the mineral character of any of the lands mentioned in said list, when a hearing may be ordered.

104. In lieu selections under the acts of June 4, 1897, and June 6, 1900, of land which has been returned as mineral, or which is within six miles of any mining claim, notice of the selection, commencing within twenty days thereafter, must be given, for a period of thirty days, by posting upon the land and in the local land office, and by publication at the cost of the applicant in a newspaper designated by the register as of general circulation in the vicinity of the land and published nearest thereto. Where the selection embraces noncontiguous tracts the notice must be posted upon each tract; but such notice will not be required in any case where the selection is in lieu of "a tract covered by an unperfected *bona fide* claim," viz: A tract the title to which has not passed out of the United States or for which patent certificate has not issued.

105. At the hearings under either of the aforesaid classes, the claimants and witnesses will be thoroughly examined with regard to the character of the land; whether the same has been thoroughly prospected; whether or not there exists within the tract or tracts claimed any lode or vein of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or other valuable deposit which has ever been claimed, located, recorded, or worked; whether such work is entirely abandoned, or whether occasionally resumed; if such lode does exist, by whom claimed, under what designation, and in

which subdivision of the land it lies; whether any placer mine or mines exist upon the land; if so, what is the character thereof—whether of the shallow-surface description, or of the deep cement, blue lead, or gravel deposits; to what extent mining is carried on when water can be obtained, and what the facilities are for obtaining water for mining purposes; upon what particular ten-acre subdivisions mining has been done, and at what time the land was abandoned for mining purposes, if abandoned at all.

106. The testimony should also show the agricultural capacities of the land, what kind of crops are raised thereon, and the value thereof; the number of acres actually cultivated for crops of cereals or vegetables, and within which particular ten-acre subdivision such crops are raised; also which of these subdivisions embrace the improvements, giving in detail the extent and value of the improvements, such as house, barn, vineyard, orchard, fencing, etc., and mining improvements.

107. The testimony should be as full and complete as possible; and in addition to the leading points indicated above, where an attempt is made to prove the mineral character of lands which have been entered under the agricultural laws, it should show at what date, if at all, valuable deposits of minerals were first known to exist on the lands.

108. When the case comes before this office, such decision will be made as the law and the facts may justify. In cases where a survey is necessary to set apart the mineral from the agricultural land, the proper party, *at his own expense*, will be required to have the work done by a surveyor to be designated by the surveyor-general. Application therefor must be made to the register and receiver, accompanied by description of the land to be segregated and the evidence of service upon the opposite party of notice of his intention to have such segregation made. The register and receiver will forward the same to this office, when the necessary instructions for the survey will be given. The survey in such case, where the claims to be segregated are vein or lode claims, must be executed in such manner as will conform to the requirements in section 2320, United States Revised Statutes, as to length and width and parallel end lines.

109. Such survey when executed must be properly sworn to by the surveyor, either before a notary public, officer of a court of record, or before the register or receiver, the deponent's character and credibility to be properly certified to by the officer administering the oath.

110. Upon the filing of the plat and field notes of such survey with the register and receiver, duly sworn to as aforesaid, they will transmit the same to the surveyor-general for his verification and approval; who, if he finds the work correctly performed, will furnish authenticated copies of such plat and description both to the proper local land office and to this office, made upon the usual drawing-paper township blank.

The copy of plat furnished the local office and this office must be a diagram verified by the surveyor-general, showing the claim or claims segregated, and designating the separate fractional agricultural tracts in each 40-acre legal subdivision by the proper lot number, beginning with No. 1 in each section, and giving the area in each lot, the same as provided in paragraph 37 in the survey of mining claims on surveyed lands.

111. The fact that a certain tract of land is decided upon testimony to be mineral in character is by no means equivalent to an award of

the land to a miner. In order to secure a patent for such land, he must proceed as in other cases, in accordance with the foregoing regulations.

Blank forms for proofs in mineral cases are not furnished by the General Land Office.

DISTRICT OF ALASKA.

112. Section 13, act of May 14, 1898, according to native-born citizens of Canada "the same mining rights and privileges" in the district of Alaska as are accorded to citizens of the United States in British Columbia and the Northwest Territory by the laws of the Dominion of Canada, is not now and never has been operative, for the reason that the only mining rights and privileges granted to any person by the laws of the Dominion of Canada are those of leasing mineral lands upon the payment of a stated royalty, and the mining laws of the United States make no provision for such leases.

113. For the sections of the act of June 6, 1900, making further provision for a civil government for Alaska, which provide for the establishment of recording districts and the recording of mining locations; for the making of rules and regulations by the miners and for the legalization of mining records; for the extension of the mining laws to the district of Alaska, and for the exploration and mining of tide lands and lands below low tide; and relating to the rights of Indians and persons conducting schools or missions, see page 20 of this circular.

MINERAL LANDS WITHIN FOREST RESERVES.

114. The act of June 4, 1897, provides that "any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry," notwithstanding the reservation. This makes mineral lands in the forest reserves subject to location and entry under the general mining laws in the usual manner.

The act also provides that, "The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by *bona fide* settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such reservations may be located."

For further instructions under this act see circular of April 4, 1900 (30 L. D., 23, 28-30).

SURVEYS OF MINING CLAIMS.

GENERAL PROVISIONS.

115. Under section 2334, U. S. Rev. Stats., the U. S. surveyor-general "may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims."

116. Persons desiring such appointments should therefore file their applications with the surveyor-general for the district wherein appointment is asked, who will furnish all information necessary.

117. All appointments of deputy mineral surveyors must be submitted to the Commissioner of the General Land Office for approval.

118. The surveyors-general have authority to suspend or revoke the commissions of deputy mineral surveyors for cause. Before final action, however, the matter should be submitted to the Commissioner of the General Land Office for approval.

119. Such surveyors will be allowed the right of appeal from the action of the surveyor-general in the usual manner. Such appeal should be filed with the surveyor-general, who will at once transmit the same, with a full report, to the General Land Office.

120. Neither the surveyor-general nor the Commissioner of the General Land Office has jurisdiction to settle differences, relative to the payment of charges for field work, between deputy mineral surveyors and claimants. These are matters of private contract and must be enforced in the ordinary manner, *i. e.*, in the local courts. The Department has, however, authority to investigate charges affecting the official actions of deputy mineral surveyors, and will, on sufficient cause shown, suspend or revoke their appointment.

121. The surveyors-general should appoint as many competent deputy mineral surveyors as apply for appointment, in order that claimants may have a choice of surveyors, and be enabled to have their work done on the most advantageous terms.

122. The schedule of charges for office work should be as low as is possible. No additional charges should be made for orders for amended surveys, unless the necessity therefor is clearly the fault of the claimant, or considerable additional office work results therefrom.

123. In cases where the error in the original survey is due to the carelessness or neglect of the surveyor who made it, he should be required to make the necessary corrections in the field at his own expense, and the surveyor-general should advise him that the penalty for failure to comply with instructions within a specified time will be the suspension or revocation of his commission.

124. Mineral surveyors will address all official communications to the surveyor-general. They will, when a mining claim is the subject of correspondence, give the name and survey number. In replying to letters they will give the subject-matter and date of the letter. They will promptly notify the surveyor-general of any change in post-office address.

125. Mineral surveyors should keep a complete record of each survey made by them and the facts coming to their knowledge at the time, as well as copies of all their field notes, reports, and official correspondence, in order that such evidence may be readily produced when called for at any future time. Field notes and other reports must be written in a clear and legible hand or typewritten, in non-copying ink, and upon the proper blanks furnished gratuitously by the surveyor-general's office upon application therefor. No interlineations or erasures will be allowed.

126. No return by a mineral surveyor will be recognized as official unless it is over his signature as a United States deputy mineral surveyor, and made in pursuance of a special order from the surveyor-general's office. After he has received an order for survey he is required to make the survey and return correct field notes thereof to the surveyor-general's office without delay.

127. The claimant is required, in all cases, to make satisfactory

arrangements with the surveyor for the payment for his services and those of his assistants in making the survey, as the United States will not be held responsible for the same.

128. A mineral surveyor is precluded from acting, either directly or indirectly, as attorney in mineral claims. His duty in any particular case ceases when he has executed the survey and returned the field notes and preliminary plat, with his report, to the surveyor-general. He will not be allowed to prepare for the mining claimant the papers in support of his application for patent, or otherwise perform the duties of an attorney before the land office in connection with a mining claim. He is not permitted to combine the duties of surveyor and notary public in the same case by administering oaths to the parties in interest, but as a notary public he may administer the oaths to his assistants in making the survey; otherwise he must have absolutely nothing to do with the case, except in his official capacity as surveyor. He will make no survey of a mineral claim in which he holds an interest, nor will he employ chainmen interested therein in any manner.

SURVEY—HOW MADE.

129. The survey made and returned must, in every case, be an actual survey on the ground in full detail, made by the mineral surveyor in person after the receipt of the order, and without reference to any knowledge he may have previously acquired by reason of having made the location survey or otherwise, and must show the actual facts existing at the time. This precludes him from calculating the connections to corners of the public survey and location monuments, or any other lines of his survey through prior surveys made by others and substituting the same for connections or lines of the survey returned by him. The term *survey* in this paragraph applies not only to the usual field work, but also to the examinations required for the preparation of affidavits of five hundred dollars expenditure, descriptive reports on placer claims, and all other reports.

130. The survey of a mining claim may consist of several contiguous locations, but such survey must, in conformity with statutory requirements, distinguish the several locations, and exhibit the boundaries of each. The survey will be given but one number.

131. The survey must be made in strict conformity with, or be embraced within, the lines of the location upon which the order is based. If the survey and location are identical, that fact must be clearly and distinctly stated in the field notes. If not identical, a bearing and distance must be given from each established corner of survey to the corresponding corner of the location, and the location corner must be fully described, so that it can be identified. The lines of the location, as found upon the ground, must be laid down upon the preliminary plat in such a manner as to contrast and show their relation to the lines of survey.

132. In view of the principle that courses and distances must give way when in conflict with fixed objects and monuments, the surveyor will not, under any circumstances, change the corners of the location for the purpose of making them conform to the description in the record. If the difference from the location be slight, it may be explained in the field notes.

133. No mining claim located subsequent to May 10, 1872, should

exceed the statutory limit in width on each side of the center of vein or 1,500 feet in length, and all surveys must close within 50-100 feet in 1,000 feet, and the error must not be such as to make the location exceed the statutory limit, and in absence of other proof the discovery point is held to be the center of the vein on the surface. The course and length of the vein should be marked upon the plat.

134. All mineral surveys must be made with a transit, provided with a solar attachment, by which the meridian can be determined independently of the magnetic needle, and all courses must be referred to the true meridian. The variation should be noted at each corner of the survey. The true course of at least one line of each survey must be ascertained by astronomical observations made at the time of the survey; the data for determining the same and details as to how these data were arrived at must be given. Or, in lieu of the foregoing the survey must be connected with some line the true course of which has been previously established beyond question, and in a similar manner, and, when such lines exist, it is desirable in all cases that they should be used as a proof of the accuracy of subsequent work.

135. Corner No. 1 of each location embraced in a survey must be connected by course and distance with nearest corner of the public survey or with a United States location monument, if the claim lies within two miles of such corner or monument. If both are within the required distance the connection must be with the corner of the public survey.

136. Surveys and connections of mineral claims may be made in suspended townships in the same manner as though the claims were upon unsurveyed land, except as hereinafter specified, by connecting them with independent mineral monuments. At the same time, the position of any public-land corner which may be found in the neighborhood of the claim should be noted, so that, in case of the release of the township from suspension, the position of the claim can be shown on the plat.

137. A mineral survey must not be returned with its connection made only with a corner of the public survey, where the survey of the township within which it is situated is under suspension, nor connected with a mineral monument alone, when situated within the limits of a township the regularity and correctness of the survey of which is unquestioned.

138. In making an official survey, corner No. 1 of each location must be established at the corner nearest the corner of the public survey or location monument, unless good cause is shown for its being placed otherwise. If connections are given to both a corner of the public survey and location monument, corners Nos. 1 should be placed at the corner nearest the corner of the public survey. When a boundary line of a claim intersects a section line courses and distances from point of intersection to the Government corners at each end of the half mile of section line so intersected must be given.

139. In case a survey is situated in a district where there are no corners of the public survey and no monuments within the prescribed limits, a mineral monument must be established, in the location of which the greatest care must be exercised to insure permanency as to site and construction.

140. The site, when practicable, should be some prominent point, visible for a long distance from every direction, and should be so chosen

that the permanency of the monument will not be endangered by snow, rock, or landslides, or other natural causes.

141. The monument should consist of a stone not less than 30 inches long, 20 inches wide, and 6 inches thick, set halfway in the ground, with a conical mound of stone 4 feet high and 6 feet base alongside. The letters U. S. L. M., followed by the consecutive number of the monument in the district, must be plainly chiseled upon the stone. If impracticable to obtain a stone of required dimensions, then a post 8 feet long, 6 inches square, set 3 feet in the ground, scribed as for a stone monument, protected by a well-built conical mound of stone of not less than 3 feet high and 6 feet base around it, may be used. The exact point for connection must be indicated on the monument by an X chiseled thereon; if a post is used, then a tack must be driven into the post to indicate the point.

142. From the monument, connections by course and distance must be taken to two or three bearing trees or rocks, and to any well-known and permanent objects in the vicinity, such as the confluence of streams, prominent rocks, buildings, shafts, or mouths of adits. Bearing trees must be properly scribed B. T. and bearing rocks chiseled B. R., together with the number of the location monument; the exact point on the tree or stone to which the connection is taken should be indicated by a cross or other unmistakable mark. Bearings should also be taken to prominent mountain peaks, and the approximate distance and direction ascertained from the nearest town or mining camp. A detailed description of the locating monument, with a topographical map of its location, should be furnished the office of the surveyor-general by the surveyor.

143. Corners may consist of—

First.—A stone at least 24 inches long set 12 inches in the ground, with a conical mound of stone $1\frac{1}{2}$ feet high, 2 feet base, alongside.

Second.—A post at least 3 feet long by 4 inches square, set 18 inches in the ground and surrounded by a substantial mound of stone or earth.

Third.—A rock in place.

A stone should always be used for a corner when possible, and when so used the kind should be stated.

144. All corners must be established in a permanent and workmanlike manner, and the corner and survey number must be neatly chiseled or scribed on the sides facing the claim. The *exact* corner point must be permanently indicated on the corner. When a rock in place is used its dimensions above ground must be stated and a cross chiseled at the exact corner point.

145. In case the point for the corner be inaccessible or unsuitable a witness corner, which must be marked with the letters W. C. in addition to the corner and survey number, should be established. The witness corner should be located upon a line of the survey and as near as possible to the true corner, with which it must be connected by course and distance. The reason why it is impossible or impracticable to establish the true corner must always be stated in the field notes, and in running the next course it should be stated whether the start is made from the true place for corner or from witness corner.

146. The identity of all corners should be perpetuated by taking courses and distances to bearing trees, rocks, and other objects, as

prescribed in the establishment of location monuments, and when no bearings are given it should be stated that no bearings are available. Permanent objects should be selected for bearings whenever possible.

147. If an official survey has been made within a reasonable distance in the vicinity, there should be a connecting line run to some corner of the same, and in like manner all conflicting surveys and claims should be so connected, and the corner with which the connection is made described. In survey of contiguous locations which are part of a consolidated claim, where corners are common, bearings should be mentioned but once.

148. The mineral surveyor should note carefully all topographical features of the claim, taking distances on his lines to intersections with all streams, gulches, ditches, ravines, mountain ridges, roads, trails, etc., with their widths, courses, and other data that may be required to map them correctly. All municipal or private improvements, such as blocks, streets, and buildings, should be located.

149. If, in running the exterior lines of a claim, the survey is found to conflict with the survey of another claim, the distances to the points of intersection, and the courses and distances along the line intersected from an established corner of such conflicting claim to such points of intersection, should be described in the field notes: *Provided*, That where a corner of the conflicting survey falls within the claim being surveyed, such corner should be selected from which to give the bearing, otherwise the corner nearest the intersection should be taken. The same rule should govern in the survey of claims embracing two or more locations the lines of which intersect.

150. A lode and mill-site claim in one survey will be distinguished by the letters A and B following the number of the survey. The corners of the mill site will be numbered independently of those of the lode. Corner No. 1 of the mill site must be connected with a corner of the lode claim as well as with a corner of the public survey or United States location monument.

151. When a placer claim includes lodes, or when several contiguous placer or lode locations are included as one claim in one survey, there must be given to the corners of each location constituting the same a separate consecutive numerical designation, beginning with corner No. 1 in each case.

152. Throughout the description of the survey, after each reference to the lines or corners of a location, the name thereof must be given, and if unsurveyed, the fact stated. If reference is made to a location included in a prior official survey, the survey number must be given, followed by the name of the location. Corners should be described once only.

153. The total area of each location and also the area in conflict with each intersecting survey or claim should be stated; also the total area claimed. But when locations embraced in one survey conflict with each other such conflicts should only be stated in connection with the location from which the conflicting area is excluded.

154. It should be stated particularly whether the claim is upon surveyed or unsurveyed public lands, giving in the former case the quarter section, township, and range in which it is located, and the section lines should be indicated by full lines and the quarter-section lines by dotted lines.

155. The title-page of the field notes must contain the post-office address of the claimant or his authorized agent.

156. In the mineral surveyor's certificate of the value of the improvements all *actual* expenditures and *mining* improvements made by the claimant or his grantors, having a direct relation to the development of the claim, must be included in the estimate.

157. The expenditures required may be made from the surface or in running a tunnel, drifts, or crosscuts for the development of the claim. Improvements of any other character, such as buildings, machinery, or roadways, must be excluded from the estimate, unless it is shown clearly that they are associated with actual excavations, such as cuts, tunnels, shafts, etc., are essential to the practical development of, and actually facilitate the extraction of mineral from, the claim.

158. All mining and other improvements claimed will be located by courses and distances from corners of the survey, or from points on the center or side lines, specifying with particularity and detail the dimensions and character of each, and the improvements upon each location should be numbered consecutively, the point of discovery being always No. 1. Improvements made upon other locations, or by a former locator who has abandoned the claim, can not be included in the estimate, but should be described and located in the notes and plat.

159. In case of a lode and mill-site claim in the same survey the expenditure of five hundred dollars must be shown upon the lode claim.

160. If the value of the labor and improvements upon a mineral claim is less than five hundred dollars at the time of survey, the mineral surveyor may file with the surveyor-general supplemental proof showing five hundred dollars expenditure made prior to the expiration of the period of publication.

161. The mineral surveyor will return with his field notes a preliminary plat on blank sent to him for that purpose, protracted on a scale of two hundred feet to an inch, if practicable. In preparing plats the top is north. Copy of the calculations of areas by double meridian distances and of all triangulations or traverse lines must be furnished. The lines of the claim surveyed should be heavier than the lines of conflicting claims.

162. Whenever a survey has been reported in error the surveyor who made it will be required to promptly make a thorough examination upon the premises and report the result, under oath, to the surveyor-general's office. In case he finds his survey in error he will report in detail all discrepancies with the original survey and submit any explanation he may have to offer as to the cause. If, on the contrary, he should report his survey correct, a joint survey will be ordered to settle the differences with the surveyor who reported the error. A joint survey must be made within ten days after the date of order unless satisfactory reasons are submitted, under oath, for a postponement. The field work must in every sense of the term be a *joint* and not a separate survey, and the observations and measurements taken with the same instrument and chain, previously tested and agreed upon.

163. The surveyor found in error, or, if both are in error, the one who reported the same, will make out the field notes of the joint survey, which, after being duly signed and sworn to by both parties, must be transmitted to the surveyor-general's office.

164. Inasmuch as amended surveys are ordered only by special instructions from the General Land Office, and the conditions and circumstances peculiar to each separate case, and the object sought by the required amendment, alone govern all special matters relative to the manner of making such survey and the form and subject-matter to be embraced in the field notes thereof, but few general rules applicable to all cases can be laid down.

165. The amended survey must be made in strict conformity with, or be embraced within, the lines of the original survey. If the amended and original surveys are identical, that fact must be clearly and distinctly stated in the field notes. If not identical, a bearing and distance must be given from each established corner of the amended survey to the corresponding corner of the original survey. The lines of the original survey, as found upon the ground, must be laid down upon the preliminary plat in such manner as to contrast and show their relation to the lines of the amended survey.

166. The field notes of the amended survey must be prepared on the same size and form of blanks as are the field notes of the original survey, and the word "amended" must be used before the word "survey" wherever it occurs in the field notes.

167. Mineral surveyors are required to make full examinations of all placer claims at the time of survey and file with the field notes a descriptive report, in which will be described—

(a) The quality and composition of the soil, and the kind and amount of timber and other vegetation.

(b) The *locus* and size of streams, and such other matter as may appear upon the surface of the claims.

(c) The character and extent of all surface and under-ground workings, whether placer or lode, for mining purposes, locating and describing them.

(d) The proximity of centers of trade or residence.

(e) The proximity of well-known systems of lode deposits or of individual lodes.

(f) The use or adaptability of the claim for placer mining, and whether water has been brought upon it in sufficient quantity to mine the same, or whether it can be procured for that purpose.

(g) What works or expenditures have been made by the claimant or his grantors for the development of the claim, and their situation and location with respect to the same as applied for.

(h) The true situation of all mines, salt licks, salt springs, and mill sites which come to the surveyor's knowledge, or a report by him that none exist on the claim, as the facts may warrant.

(i) Said report must be made under oath and duly corroborated by one or more disinterested persons.

168. The employing of claimants, their attorneys, or parties in interest, as assistants in making surveys of mineral claims, will not be allowed.

169. The field work must be accurately and properly performed and returns made in conformity with the foregoing instructions. Errors in the survey must be corrected at the surveyor's own expense, and if the time required in the examination of the returns is increased by reason of neglect or carelessness, he will be required to make an additional deposit for office work. He will be held to a strict accountability

for the faithful discharge of his duties, and will be required to observe fully the requirements and regulations in force as to making mineral surveys. If found incompetent as a surveyor, careless in the discharge of his duties, or guilty of a violation of said regulations, his appointment will be promptly revoked.

BINGER HERMANN,
Commissioner.

Approved.

E. A. HITCHCOCK, *Secretary.*

REGULATIONS CONCERNING RIGHT OF WAY FOR CANALS, DITCHES, AND RESERVOIRS OVER THE PUBLIC LANDS AND RESERVATIONS.

Sections 18, 19, 20, and 21 of the act of Congress approved March 3, 1891 (26 Stat., 1095), entitled "An act to repeal timber-culture laws, and for other purposes," grant the right of way through the public lands and reservations of the United States for the use of canals, ditches, reservoirs heretofore or hereafter constructed by corporations, individuals, or associations of individuals upon the filing and approval of the papers and maps therein provided for. When the right of way is upon a reservation not within the jurisdiction of the Interior Department, the application must be filed in accordance with these regulations, and will be submitted to the Department having jurisdiction. A map and field notes of the portion within any reservation must be submitted, in addition to the duplicates required herein, except in the case of a forest or timber land reserve. This map and field notes must conform to all the provisions of this circular, and the local officers will forward them to this office.

The word *adjacent*, as used in section 18 of the act, in connection with the right to take material for construction from the public lands, must be construed according to the conditions of each separate case (28 L. D., 439). The right extends only to construction, and no public timber or material may be taken or used for repair or improvements (14 L. D., 566). These decisions were rendered under the railroad right-of-way act, and are applied to this, as the words are the same in both.

The sections above noted read as follows:

SEC. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation, and duly organized under the laws of any State or Territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reser-

Right of way
in reservations.

Material, etc.,
on adjacent
lands.

Right of way
granted to irriga-
tion corpora-
tions.

voir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: *Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.

Material, etc., on adjacent lands. **In reservations.** **Control of water.** **Right of way on unsurveyed land.** **Damages for injuries.** **Right of way for individuals.** **Forfeiture.** **Extent of right of way.**

SEC. 19. That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of this canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

SEC. 20. That the provisions of this act shall apply to all canals, ditches, or reservoirs, heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal, or reservoir, has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the Secretary of the Interior, and with the register of the land office where said land is located, a map of the line of such canal, ditch, or reservoir, as in a case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of this act from the date of their filing, as though filed under it: *Provided*, That if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture.

SEC. 21. That nothing in this act shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch.

The act approved May 11, 1898 (30 Stat., 404), entitled "An act to amend an act to permit the use of the right of way through public lands for tramroads, canals, and reservoirs, and for other purposes," makes an important declaration in section 2 as to the purposes for which the

rights of way under the act of 1891 may be used. The language of the act of 1898 is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act entitled "An act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes," approved January twenty-first, eighteen hundred and ninety-five, be, and the same is hereby, amended by adding thereto the following:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way upon the public lands of the United States, not within limits of any park, forest, military, or Indian reservations, for tramways, canals, or reservoirs, to the extent of the ground occupied by the water of the canals and reservoirs, and fifty feet on each side of the marginal limits thereof, or fifty feet on each side of the center line of the tramroad, by any citizen or association of citizens of the United States, for the purposes of furnishing water for domestic, public, and other beneficial uses.

Amending act
of January 21,
1895.

"Sec. 2. That rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the act entitled 'An act to repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation."

Amending act
of March 3, 1891.

1. These acts are evidently designed to encourage the much-needed work of constructing ditches, canals, and reservoirs in the arid portion of the country by granting right of way over the public lands necessary to the maintenance and use of the same. The eighteenth section of the act of 1891 provides that—

The privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.

The control of the flow and use of the water is therefore, so far as this act is concerned, a matter exclusively under State or Territorial control, the matter of administration within the jurisdiction of this Department being limited to the approval of maps carrying the right of way over the public lands. In submitting maps for approval under this act, however, which in any wise appropriate natural sources of water supply, such as the damming of rivers or the appropriation of lakes, such maps should be accompanied by proof that the plans and purposes of the projectors have been regularly submitted and approved in accordance with the local laws or customs governing

Control of
water.

Right of way
on lakes and
streams.

the use of water in the State or Territory in which the same is located. No general rule can be adopted in regard to this matter. Each case must rest upon the showing filed in support thereof.

Nature of grant.

2. The act is not in the nature of a grant of lands; but it is a base or qualified fee, giving the possession and right of use of the land for the purposes contemplated by the law, a reversionary interest remaining in the United States, to be conveyed by it to the person to whom the land may be patented, whose rights will be subject to those of the grantee of the right of way. All persons settling on a tract of public land, to part of which right of way has attached for a canal, ditch, or reservoir, take the same subject to such right of way, and at the full area of the subdivision entered, there being no authority to make deduction in such cases. If a settler has a valid claim to land existing at the date of the filing of the map of definite location, his right is superior, and he is entitled to such reasonable measure of damages for right of way as may be determined upon by agreement or in the courts, the question being one that does not fall within the jurisdiction of this Department. By section 21 of the act above quoted it will be seen that the approval of a map of a canal, ditch, or reservoir does not necessarily carry with it a right to the use of land 50 feet on each side, the approval of the Department granting only such right of way as the law provides. The width necessary for construction, maintenance, and care of a canal, ditch, or reservoir is not determined.

No deduction for right of way on land subsequently entered.

Width of right of way.

3. Whenever a right of way is located upon a forest or timber-land reserve, the applicant must file a stipulation under seal, incorporating the following:

Stipulations as to right of way on forest reserves.

(1) That the proposed right of way is not so located as to interfere with the proper occupation of the reservation by the Government.

(2) That the applicant will cut no timber from the reserve outside the right of way.

Removing timber, etc.

(3) That the applicant will remove no timber within the right of way except only such as is rendered necessary by the proper use and enjoyment of the privilege for which application is made, and that he will also remove from the reservation, or destroy, under proper safeguards as determined by this office, all standing, fallen, and dead timber, as well as all tops, lops, brush, and refuse cuttings on the right of way, for such distance on each side of the central

line as may be determined by the General Land Office to be essential to protect the forest from fire to the fullest extent possible.

The applicant will also be required to give bond to the Government of the United States, to be approved by the Commissioner of the General Land Office, such bond stipulating that the makers thereof will pay to the United States "for any and all damage to the public lands, timber, natural curiosities, or other public property on such reservation, or upon the lands of the United States, by reason of such use and occupation of the reserve, regardless of the cause or circumstances under which such damage may occur." A bond furnished by any surety company that has complied with the provisions of the act of August 13, 1894 (28 Stat., 279), will be accepted, and must run in the terms of the stipulation above quoted. The amount of the bond can not be fixed until the application has been submitted to the General Land Office, when a form of bond will be furnished and the amount thereof fixed. Bond.

No construction can be allowed on a reservation until an application for right of way has been regularly filed in accordance with the laws of the United States and has been approved by the Department, or has been considered by this office or the Department, and permission for such construction has been specifically given. No construction on reserve in advance of approval or special permission.

4. Canals, ditches, or reservoirs lying partly upon unsurveyed land can be approved if the application and accompanying maps and papers conform to these regulations, but the approval will only relate to that portion traversing the surveyed lands. (For right of way wholly on unsurveyed land, see paragraphs 16 and 17.) Right of way on unsurveyed land.

5. Any incorporated company desiring to obtain the benefits of the law is required to file the following papers and maps with the register of the land district in which the canal, ditch, or reservoir is to be located, who will forward them to the General Land Office, where, after examination, they will be submitted to the Secretary of the Interior with recommendation as to their approval:

First. A copy of its articles of incorporation, duly certified to by the proper officers of the company under its corporate seal, or by the secretary of the State or Territory where organized. Articles of incorporation.

Second. A copy of the State or Territorial law under which the company was organized (when organized under State or Territorial law), with certificate of the governor State laws.

or secretary of the State or Territory, under seal, that the same is the existing law. (See eleventh subdivision of this paragraph.)

Filing with
State officer.

Third. When said law directs that the articles of association or other papers connected with the organization be filed with any State or Territorial officer, the certificate of such officer that the same have been filed according to law, with the date of the filing thereof.

Operating in
State different
from that of or-
ganization.

Fourth. When a company is operating in a State or Territory other than that in which it is incorporated, the certificate of the proper officer of the State or Territory is required that it has complied with the laws of that State or Territory governing foreign corporations to the extent required to entitle the company to operate in such State or Territory.

No forms are prescribed for the above portion of the "due proofs" required, as each case must be governed to some extent by the laws of the State or Territory.

Form 1.

Fifth. The official statement, under the seal of the company, of the proper officer that the organization has been completed, that the company is fully authorized to proceed with construction according to the existing law of the State or Territory, and that the copy of the articles filed is true and correct. (See Form 1, p. 521.)

Form 2.

Sixth. A true list, signed by the president, under the seal of the company, showing the names and designations of its officers at the date of the filing of the proofs. (See Form 2, p. 521.)

Evidence of
right to appro-
priate water.

Seventh. A copy of the company's title or right to appropriate the water needed for its canals, ditches, and reservoirs, certified as required by the State or Territorial laws. If the miner's inch is the unit used in such title, its equivalent in cubic feet per second must be stated. In cases where the right to appropriate the water has not been adjudicated under the local laws, a certified copy of the notice of appropriation will be sufficient. In cases where the notice of appropriation is accompanied by a map of the canal or reservoir it will not be necessary to furnish a copy of it if the notice describes the location sufficiently to identify it with the canal or reservoir for which the right-of-way application is made. In cases where the water-right claim has been transferred a number of times it is not necessary to furnish a copy of each instrument of transfer; an abstract of title will be accepted.

Eighth. A copy of the State or Territorial laws governing water rights and irrigation, with the certificate of the governor or secretary of the State or Territory that the same is the existing law. (See eleventh subdivision of this paragraph.) Water - right laws.

Ninth. A statement of the amount of water flowing in the stream supplying the canal, ditch, or reservoir, at the point of diversion or damming, during the preceding year or years. For this purpose it will be necessary to give the maximum, minimum, and average monthly flow in cubic feet per second, and the average annual flow. All available data as to the flow is required. The method of measurement or estimate by which these results have been obtained must be fully stated. In case there is no well-defined flow which can be measured, the area of the watershed, average annual rainfall, and estimated run-off at the point of diversion or damming should be given. Flow of water.

Tenth. Maps, field notes, and other papers, as hereinafter required. Maps, etc.

Eleventh. If certified copies of the existing laws regarding corporations and irrigation, and of new laws as passed from time to time, be forwarded to this office by the governor or secretary of the State or Territory, the applicant may file, in lieu of the requirements of the second and eighth subdivisions of this paragraph, a certificate of the governor or secretary of state, under seal, that no change has been made since a given date, not later than that of the laws last forwarded. Certificate as to State laws.

6. Individuals or associations of individuals making applications for right of way are required to file the information called for in the seventh, eighth, ninth, and tenth subdivisions of the previous paragraph. Associations of individuals must, in addition, file their articles of association; if there be none, the fact must be stated over the signature of each member of the association. Applications by individuals.

7. The maps filed must be drawn on tracing linen in duplicate, and must be strictly conformable to the field notes of the survey thereof. They must be filed in the land office for the district in which the right of way is located; but if located in more than one district, duplicate maps and field notes need be filed in but one district, and single sets in the others. The maps should show other canals, ditches, laterals, or reservoirs with which connections are made, but they must be distinguished from those Maps on tracing linen.
Filing in local land office.
Other canals, etc.

for which right of way is desired by ink of a different color.

Field notes. 8. Field notes of the surveys must be filed in duplicate, separate from the map, and in such form that they may be folded for filing. Complete field notes should not be

Not on map. placed on the map, but only the station numbers where deflections or changes of numbering occur, station numbers with distances to corners where the lines of the public surveys are crossed, and the lines of reference of initial and terminal points, with their courses and distances.

Full data. Typewritten field notes with clear carbon copies are preferred, as they expedite the examination of applications. The field notes should contain, in addition to the ordinary records of surveys, the data called for in this and in the following paragraphs. They should state which line of the canal was run—whether middle or a specified side line.

The stations or courses should be numbered in the field notes and on the map. The record should be so complete that from it the surveys could be accurately retraced by a competent surveyor with proper instruments. The field

Declination. notes should show whether the lines were run on the true or the magnetic bearings, and in the latter case the declination of the needle and date of determination must be stated. The kind and size of the instrument used in running the lines and its minimum reading on the horizontal

Methods of survey. circle should be noted. The line of survey should be that of the actual location of the proposed ditch and, as exactly as possible, the water line of the proposed reservoir. The method of running the grade lines of canals and the water lines of reservoirs must be described.

Scale. 9. The scale of the map should be 2,000 feet to an inch in the case of canals or ditches and 1,000 feet to an inch in the case of reservoirs. The maps may, however, be drawn to a larger scale when needed to properly show the proposed works; but the scale must not be so greatly increased as to make the map inconveniently large for handling.

Public-land subdivisions. 10. All subdivisions of the public surveys represented on the map should have their entire boundaries drawn, and on all lands affected by the right of way the smallest legal subdivisions (40-acre tracts and lots) must be shown.

Initial and terminal points. 11. The termini of a canal, ditch, or lateral should be fixed by reference of course and distance to the nearest existing corner of the public survey. The initial point of the survey of a reservoir should be fixed by reference of

course and distance to the nearest existing corner outside the reservoir by a line which does not cross an area that will be covered with water when the reservoir is in use. The map, field notes, engineer's affidavit, and applicant's certificate (Forms 3 and 4) should each show these connections.

12. When either terminal of a canal, ditch, or lateral is upon unsurveyed land, it must be connected by traverse with an established corner of the public survey, if not more than six miles distant from it, and the single bearing and distance from the terminal point to the corner computed and noted on the map, in the engineer's affidavit, and in the applicant's certificate (Forms 3 and 4). The notes and all data for the computation of the traverse must be given in the field notes. Connections on unsurveyed land.

13. When the distance to an established corner of the public survey is more than 6 miles, this connection will be made with a natural object or a permanent monument which can be readily found and recognized and which will fix and perpetuate the position of the terminal point. The map must show the position of such mark and course and distance to the terminus. The field notes must give an accurate description of the mark and full data of the traverse as required above. The engineer's affidavit and applicant's certificate (Forms 3 and 4) must state the connections. These monuments are of great importance. Connections with monuments on unsurveyed land.

14. When a canal, ditch, or lateral lies partly on unsurveyed land, each portion lying within surveyed and unsurveyed land will be separately stated in the field notes and in Forms 3 and 4 by connections of termini, length, and width, as though each portion were independent. (See paragraphs 11, 12, and 13.) Forms for canal, etc., on unsurveyed land.

15. When a reservoir lies partly on unsurveyed land its initial point must be noted, as required for the termini of ditches in paragraph 11, and so that the reference line will not cross an area that will be covered with water when the reservoir is in use. The areas of the several parts lying on surveyed and unsurveyed land must be separately noted on the map, in the field notes, and in Forms 3 and 4. Forms for reservoir on unsurveyed land.

16. Maps showing canals, ditches, or reservoirs wholly upon unsurveyed lands may be received and placed on file in the General Land Office and the local land office of the district in which the same is located, for general information, and the date of filing will be noted thereon; but the Right of way wholly on unsurveyed land.

same will not be submitted to nor approved by the Secretary of the Interior, as the act makes no provision for the approval of any but maps showing the location in connection with the public surveys. The filing of such maps will not dispense with the filing of maps after the survey of the lands and within the time limited in the act granting the right of way, which map, if in all respects regular when filed, will receive the Secretary's approval.

17. In filing such maps the initial and terminal points will be fixed as indicated in paragraphs 12 and 13.

Connections
with public sur-
vey corners.

18. Whenever the line of survey crosses a township or section line of the public survey, the distance to the nearest existing corner should be ascertained and noted. In the case of a reservoir the distance must not be measured across an area which will be covered with water when the reservoir is in use. The map of the canal, ditch, or reservoir must show these distances, and the field notes must give the points of intersection and the distances. When corners are destroyed by the canal or reservoir, proceed as directed in paragraphs 21 and 22.

Width of ca-
nal, etc.

19. The map must bear a statement of the width of each canal, ditch, or lateral at high-water line. If not of uniform width, the limits of the deviations from it must be clearly defined on the map. The field notes should record the changes in such a manner as to admit of exact location on the ground. In the case of a pipe line, the diameter of the pipe should be stated. The map must show the source of water supply.

Source of sup-
ply.

Capacity of
reservoir.

20. In applications for right of way for a reservoir, the capacity of the reservoir must be stated on the map in acre-feet (i. e., the number of acres that will be covered 1 foot in depth by the water it will hold; 1 acre-foot is 43,560 cubic feet). The map must show the source of water supply for the reservoir and the location and height of the dam.

Source of sup-
ply.
Height of dam.

21. Whenever a corner of the public survey will be covered by earth or water, or otherwise rendered useless, marked monuments (one on each side of destroyed corner) must be set on each township or section line passing through, or one on each line terminating at, said corner.

Witness mon-
uments for de-
stroyed public
survey corners.

These monuments must comply with the requirements for witness corners of the Manual of Surveying Instructions issued by this office, and must be at such distance from the works as to be safe from interference during the construction and operation of the same. In case two or more

consecutive corners on the same line are destroyed, the monument shall be set as required in the Manual for the nearest corner on that line to be covered.

22. The line on which such monument is set will be determined by running a random line from the corner to be destroyed to the first existing corner on the line to be marked by the monument, setting on the random line a temporary mark at the distance of the proposed monument. If the random line strikes the corner run to, the monument will be established at the place marked; if the random line passes to one side of the corner, the north and south or east and west distance to it will be measured and the true course calculated. The proper correction of the temporary mark will then be computed and a permanent monument set in the proper place. The field notes for the surveys establishing the monuments must be in duplicate and separate from those of the canal or reservoir, being certified by the surveyor under oath. They must comply with the form of field notes prescribed in the Manual of Surveying Instructions issued by this office. When application is made for a canal or reservoir which is constructed and in operation, the method to be adopted in setting the monuments, being governed by the special features of each case, must be left to the judgment of the surveyor. No field notes will be accepted unless the lines on which the monuments are set conform to the lines shown by the field notes of the survey as made originally under the direction of this office, and unless the notes are in such form that the computation can be verified and the lines retraced on the ground.

Method of establishing witness monuments.

Field notes sworn to.

Field notes must conform to public surveys.

23. The engineer's affidavit and applicant's certificate must both designate by termini (as in paragraphs 11 to 17, inclusive) and length each canal, ditch, or lateral, and by initial point and area each reservoir shown on a map, for which right of way is asked. This affidavit and this certificate (changed where necessary when an application is made by an individual or association of individuals) must be written on the map in duplicate. Applicants under the act of March 3, 1891, must include in the certificate (Form 4) the statement: "And I further certify that the right of way herein described is desired for the main purpose of irrigation," or "for public purposes," as the case may be. If for public purposes, the applicant should submit a separate statement of the nature of the proposed use. (See Forms 3 and 4, page 521.) No changes or additions are

Forms 3 and 4.

Purposes.

No changes in forms.

allowable in the substance of these forms, except when the facts differ from those assumed therein.

24. When maps are filed, the register will note on each the name of the land office and the date of filing, over his written signature. Notations will also be made on the records of the local land office, as to each *unpatented* tract affected, that application for right of way for a canal (or reservoir) is pending, giving date of filing and name of applicant. The register will certify on each map, over his written signature, that unpatented land is affected by the proposed right of way. The maps and field notes in duplicate, and any other papers filed in connection with the application, will then be promptly transmitted to the General Land Office with report that the required notations have been made on the records of the local land office. Any valid right existing at the date of the filing of the right of way application will not be affected by the filing or approval thereof. (See paragraph 2.) If no unpatented land is involved in the application, the local officers will reject it, allowing the usual right of appeal.

25. Upon the approval of a map of location by the Secretary of the Interior, the duplicate copy will be sent to the local officers, who will mark upon the township plats the lines of the canals, ditches, or reservoirs, as laid down on the map. They will also note the approval in ink, on the tract books, opposite each tract marked as required by paragraph 24.

26. When the canal, ditch, or reservoir is constructed, an affidavit of the engineer and certificate of the applicant (Forms 5 and 6) must be filed in the local office, in duplicate, for transmission to this office. No new map will be required, except in case of deviations from the right of way previously approved, whether before or after construction, when there must be filed new maps and field notes in full, as herein provided, bearing proper forms, changed to agree with the facts in the case. The map must show clearly the portions amended or bear a statement describing them, and the location must be described in the forms as the *amended* survey and the *amended* definite location. In such cases the applicant must file a relinquishment, under seal, of all rights under the former approval as to the portions amended, said relinquishment to take effect when the map of amended definite location is approved by the honorable Secretary. If the canal or reservoir has been constructed on the location originally

approved, and is to be used until the canal or reservoir on the amended location is ready for use, the relinquishment may be made to take effect upon the completion of the canal or reservoir on the amended location.

27. The act approved February 26, 1897 (29 Stat., 599), entitled "An act to provide for the use and occupation of reservoir sites reserved," permits the approval of applications under the above act of 1891 for right of way upon reservoir sites reserved under authority of the acts of October 2, 1888 (25 Stat., 505, 526), and August 30, 1890 (26 Stat., 371, 391). The text of the act is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all reservoir sites reserved or to be reserved shall be open to use and occupation under the right-of-way act of March third, eighteen hundred and ninety-one. And any State is hereby authorized to improve and occupy such reservoir sites to the same extent as an individual or private corporation, under such rules and regulations as the Secretary of the Interior may prescribe: *Provided,* That the charges for water coming in whole or part from reservoir sites used or occupied under the provisions of this act shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or part situate.

Right of way
on segregated
reservoir sites.

When an application is made under this act a reference to it should be added to Forms 4 and 6. In other respects the application should be prepared according to the preceding regulations.

OIL PIPE LINES.

28. The act approved May 21, 1896 (29 Stat., 127), entitled "An act to grant right of way over the public domain for pipe lines in the States of Colorado and Wyoming," is similar in its requirements to the right-of-way act of March 3, 1891, and the preceding regulations furnish full information as to the preparation of the maps and papers. Applicants will be governed thereby so far as they are applicable.

29. The text of the act is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way through the public lands of the United States situate in the State of Colorado and in the State of Wyoming outside of the boundary lines of the Yellowstone National Park is hereby granted to any pipe-line company or corporation formed for the purpose of transporting oils, crude or refined, which shall have filed or may hereafter file with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground

Right of way
for oil pipe lines.

Extent

occupied by said pipe line and twenty-five feet on each side of the center line of the same; also the right to take from the public lands adjacent to the line of said pipe line material, earth, and stone necessary for the construction of said pipe line.

Filing of map. SEC. 2. That any company or corporation desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of the pipe line if the same be upon surveyed lands; and if the same be upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its line, and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way.

Forfeiture. SEC. 3. That if any section of said pipe line shall not be completed within five years after the location of said section the right herein granted shall be forfeited, as to any incomplete section of said pipe line, to the extent that the same is not completed at the date of the forfeiture.

Use and extent. SEC. 4. That nothing in this act shall authorize the use of such right of way except for the pipe line, and then only so far as may be necessary for its construction, maintenance, and care.

RESERVOIRS FOR WATERING STOCK.

30. The act approved January 13, 1897 (29. Stat., 484,) entitled "An act providing for the location and purchase of public lands for reservoir sites," is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person, live-stock company, or transportation corporation engaged in breeding, grazing, driving, or transporting live stock may construct reservoirs upon unoccupied public lands of the United States, not mineral or otherwise reserved, for the purpose of furnishing water to such live stock, and shall have control of such reservoir, under regulations prescribed by the Secretary of the Interior, and the lands upon which the same is constructed, not exceeding one hundred and sixty acres, so long as such reservoir is maintained and water kept therein for such purposes: *Provided,* That such reservoir shall not be fenced and shall be open to the free use of any person desiring to water animals of any kind.

File declaratory statement. SEC. 2. That any person, live-stock company, or corporation desiring to avail themselves of the provisions of this act shall file a declaratory statement in the United States land office in the district where the land is situated, which statement shall describe the land where such reservoir is to be or has been constructed; shall state what business such corporation is engaged in; specify the capacity of the reservoir in gallons, and whether such company, person, or corporation has filed upon other reservoir sites within the same county; and if so, how many.

Construction of reservoir. SEC. 3. That at any time after the completion of such reservoir or reservoirs which, if not completed at the date of the passage of this act, shall be constructed and completed within two years after filing such declaratory statement, such person, company, or corporation

shall have the same accurately surveyed, as hereinafter provided, and shall file in the United States land office in the district in which such reservoir is located a map or plat showing the location of such reservoir, which map or plat shall be transmitted by the register and receiver of said United States land office to the Secretary of the Interior and approved by him, and thereafter such land shall be reserved from sale by the Secretary of the Interior so long as such reservoir is kept in repair and water kept therein.

Maintenance
of reservoir.

Sec. 4. That Congress may at any time amend, alter, or repeal this act.

31. Although the title indicates that lands are to be sold for reservoir sites, the act does not provide for the sale of any lands, and therefore no lands can be sold under its provisions. The act, however, directs the Secretary of the Interior to reserve the lands from sale after the approval of the map showing the location of the reservoir.

No lands sold.

32. Any person, live-stock company, or transportation corporation engaged in breeding, grazing, driving, or transporting live stock, in order to obtain the benefits of the act, must file a declaratory statement in the United States land office in the district where the land is located.

Declaratory
statement filed.

33. When the applicant is a corporation it should file also a copy of its articles of incorporation and proofs of its organization, as required in paragraph 5, subdivisions 1, 2, 3, 4, 5, 6, and 11. If these papers are filed with its first declaratory statement, a reference thereto by its number will be sufficient in any subsequent application by the company.

Articles of in-
corporation.

34. The declaratory statement must be made under oath and should be drawn in accordance with Form 9 (page 524), and must contain the following statements:

First. The post-office address of the applicant; the county in which the reservoir is to be or has been constructed; the description by the smallest legal subdivisions (40-acre tracts or lots) of the land sought to be reserved, under no circumstances exceeding 160 acres; that the land is not occupied or otherwise claimed; that to the best of the applicant's knowledge and belief the land is not mineral or otherwise reserved; the business of the applicant, including a full and minute statement of the extent to which he is engaged in breeding, grazing, driving, or transporting live stock, giving the number and kinds of such stock, the place where they are being bred or grazed, and whether within an enclosure or upon unenclosed lands, and also from where and to where they are being driven or transported; the amount and description

Form of de-
claratory state-
ment.

of the land owned or claimed by the applicant in the vicinity of the proposed reservoir; that no part of the land sought to be reserved is or will be fenced, but the same will be kept open to the free use of any person desiring to water animals of any kind; and that the lands so sought to be reserved are not, by reason of their proximity to other lands reserved for reservoirs, excluded from reservation by the regulations and rulings of the land department.

Location, etc.,
of reservoir.

Second. The location of the reservoir described by the smallest legal subdivisions (40-acre tracts or lots), its area in acres, its capacity in gallons, the source from which water is to be obtained for such reservoir, whether there are any streams or springs within 2 miles of the land sought to be reserved, and if so, where.

Other declaratory
statements.

Third. The number, location, and area of all other reservoir sites filed upon by the applicant, especially designating those located in the same county.

Notations by
local land office.

35. Upon the filing of such declaratory statements there will be noted thereon the date of filing over the signature of the officer receiving it, and they will be numbered in regular order, beginning with No. 1. The register will make the usual notations on the records, in pencil, under the designation of "Reservoir Declaratory Statement, No. —," adding the date of the act. For the filing of such reservoir declaratory statement the local officers will be authorized to charge the usual fees. (Sec. 2238, U. S. Rev. Stat.) The declaratory statement will be forwarded with the regular monthly returns, with abstracts, in the usual manner. In acting upon these statements the following general rules will be applied:

Fees.

Capacity of res-
ervoir and area
reserved.

First. No reservation will be made for a reservoir containing less than 250,000 gallons, and for a reservoir of less than 500,000 gallons capacity not more than 40 acres can be reserved. For a reservoir of 500,000 gallons and less than 1,000,000 gallons capacity not more than 80 acres can be reserved. For a reservoir of 1,000,000 gallons and less than 1,500,000 gallons capacity not more than 120 acres can be reserved. For a reservoir of 1,500,000 gallons capacity or more 160 acres may be reserved.

Restrictions in
locations of res-
ervoirs.

Second. Not more than 160 acres shall be reserved for this purpose in any section.

Third. Not more than 160 acres shall be reserved for this purpose in one group of tracts adjoining or cornering upon each other.

Fourth. A distance of one-half mile must be left between any two groups of tracts which aggregate more than 160 acres.

Fifth. The local officers will reject any reservoir declaratory statement not in conformity with these rules.

Sixth. Lands so reserved shall not be fenced, but shall be kept open to the free use of any person desiring to water animals of any kind. If lands so reserved are at any time fenced or otherwise inclosed, or if they are not kept open to the free use of any person as aforesaid desiring to water animals of any kind, or if the reservoir applicant attempts to use them for any other purpose, or if the reservation is not obtained for the bona fide and exclusive purpose of constructing and maintaining a reservoir thereon according to law, the declaratory statement, upon any such matter being made to duly appear, will be canceled and all rights thereunder be declared at an end.

Lands not to be fenced or used for other purposes.

Seventh. Notwithstanding the action of the local officers in accepting any such declaratory statement the Commissioner of the General Land Office will reject the same if upon considering the matters set forth therein it does not appear that the declaratory statement is filed in good faith for the sole purpose of accomplishing what the law authorizes to be done.

Good faith essential.

36. The reservoir, if not completed at the date of the act, shall be completed and constructed within two years after the filing of the declaratory statement, otherwise the declaratory statement will be subject to cancellation.

Construction.

37. After the construction and completion of the reservoir the applicant shall have the same accurately surveyed and mapped, in accordance with the instructions of paragraphs 7 to 24, inclusive, so far as they are applicable. The map and field notes which are not to be prepared in duplicate must be filed in the proper local office. The map must bear Forms 10 and 11 (page 525), and the field notes must be sworn to by the surveyor.

Map and field notes of constructed reservoir.

38. When the map, field notes, and other papers have been filed in the local office the date of filing will be noted thereon and the proper notations will be made on the local office records, as in the case of the declaratory statement. The maps and papers will then be promptly forwarded to this office.

Notations by local land office.

39. The map and papers will be examined by this office as to their compliance with the law and the regulations,

Approval.

Reservation.

and to determine whether the amount of land desired is warranted by the showing made in the application. If found satisfactory they will be submitted to the honorable Secretary, and upon approval the lands shown to be necessary for the proper use and enjoyment of the reservoir will be reserved from other disposition so long as the reservoir is maintained and water kept therein for the purposes named in the act.

40. Upon the receipt of notice of such reservation from this office the local officers will make the proper notations on their records and report the making thereof promptly to this office.

Annual proof of maintenance.

Form 12.

41. In order that this reservation shall be continued it is necessary that the reservoir "shall be kept in repair and water kept therein." For this reason the owner of the reservoir will be required during the month of January of each year to file in the local office an affidavit to the effect that the reservoir has been kept in repair and water kept therein during the preceding year, and that all the provisions of the act have been complied with; Form 12 (page 526) will be used for this affidavit. Upon failure to file such affidavit steps will be taken looking to the revocation of the reservation of the lands.

Reservoir on unsurveyed land.

42. If the reservoir is located on unsurveyed land, the declaratory statement may be filed, the lands being described as closely as practicable.

Purpose of these regulations.

43. The duty of this office in examining the maps and papers of all these applications is to ascertain whether the provisions of the acts of Congress are properly complied with; whether the proposed works are described in such a manner that the benefits to be granted under the various acts are defined so as to avoid future uncertainty; and whether the rights of other grantees of the Government are properly protected from interference. The above regulations are made for these purposes.

Additional data called for if needed.

44. The widely different conditions to be considered in the operations proposed by the applicants make it impossible to formulate regulations that will furnish this office with the data necessary in all cases. This office will therefore call for additional information whenever necessary for the proper consideration of any particular case.

BINGER HERMANN,
Commissioner.

Approved June 26, 1902.

E. A. HITCHCOCK,
Secretary.

FORMS FOR "DUE PROOFS" AND VERIFICATION OF MAPS OF RIGHT OF WAY FOR CANALS, DITCHES, AND RESER- VOIRS.

FORM 1.

I, _____, secretary (or president) of the _____ Company, do hereby certify that the organization of said company has been completed; that the company is fully authorized to proceed with construction according to the existing laws of the State (or Territory) of _____, and that the copy of the articles of association (or incorporation) of the company filed in the Department of the Interior is a true and correct copy of the same.

In witness whereof I have hereunto set my name and the corporate seal of the company this _____ day of _____, in the year 19____.

[Seal of company.]

_____,
— of the _____ Company.

FORM 2.

I, _____, do certify that I am the president of the _____ Company, and that the following is a true list of the officers of the said company, with the full name and official designation of each, to wit: (Here insert the full name and official designation of each officer.

In witness whereof I have hereunto set my name and the corporate seal of the company this _____ day of _____, in the year 190____.

[Seal of company.]

_____,
President of the _____ Company.

FORM 3.

STATE OF _____,

County of _____, ss:

_____, being duly sworn, says he is the chief engineer of (or the person employed to make the survey by) the _____ Company; that the survey of said company's (canals, ditches, and reservoirs), described as follows: (Here describe each canal, ditch, lateral, and reservoir for which right of way is asked, as required by paragraph 23, being a total length of canals, ditches, and laterals of _____ miles, and a total area of reservoirs of _____ acres), was made by him (or under his direction) as chief engineer of the company (or as surveyor employed by the company) and under its authority, commenced on the _____ day of _____, 19____, and ending on the _____ day of _____, 19____, and that the survey of the said (canals, ditches, laterals, and reservoirs) accurately represents (a proper grade line for the flow of water, and accurately represents a level line, which is the proposed water line of the said reservoir), and that such survey is accurately represented upon this map and by the accompanying field notes. And no lake or lake bed, stream or stream bed, is used for the said (canals, ditches, laterals, and reservoirs) except as shown on this map.

Sworn and subscribed to before me this _____ day of _____, 19____.

[SEAL.]

_____,
Notary Public.

FORM 4.

I, _____, do hereby certify that I am president of the _____ Company; that _____, who subscribed the accompanying affidavit, is the chief

engineer of (or was employed to make the survey by) the said company; that the survey of the said (canals, ditches, laterals, and reservoirs), as accurately represented on this map and by the accompanying field notes, was made under authority of the company; that the company is duly authorized by its articles of incorporation to construct the said (canals, ditches, laterals, and reservoirs) upon the location shown upon this map; that the said (canals, ditches, laterals, and reservoirs), as represented on this map and by said field notes, was adopted by the company, by resolution of its board of directors, on the — day of —, 19—, as the definite location of the said (canals, ditches, laterals, and reservoirs) described as follows— (describe as in Form 3)—and that no lake or lake bed, stream or stream bed, is used for the said (canals, ditches, laterals, and reservoirs) except as shown on this map; and that the map has been prepared to be filed for the approval of the Secretary of the Interior, in order that the company may obtain the benefits of ^a (sections 18 to 21, inclusive, of the act of Congress approved March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes," and section 2 of the act approved May 11, 1898); and I further certify that the right of way herein described is desired for the main purpose of irrigation. ^b

Attest:

[Seal of company.]

_____,
President of the _____ Company,
_____,
Secretary.

FORM 5.

STATE OF _____,

County of _____, ss:

_____, being duly sworn, says that he is the chief engineer of (or was employed to construct) the (canals, ditches, laterals, and reservoirs) of the _____ Company; that said (canals, ditches, laterals, and reservoirs) have been constructed under his supervision, as follows: (Describe as required in paragraph 23) a total length of constructed (canals, ditches, and laterals) of _____ miles, and a total area of constructed reservoirs of _____ acres; that construction was commenced on the — day of —, 19—, and completed on the — day of —, 19—; that the constructed (canals, ditches, laterals, and reservoirs), as aforesaid, conform to the map and field notes which received the approval of the Secretary of the Interior on the — day of —, 19—.

Sworn and subscribed to before me this — day of —, 19—.

[SEAL.]

_____,
Notary Public.

FORM 6.

I, _____, do certify that I am the president of the _____ Company; that the (canals, ditches, laterals, and reservoirs) described as follows (describe as in Form 5) were actually constructed as set forth in the accompanying affidavit of _____, chief engineer (or the person employed by the company in the premises), and on the exact location represented on the map and by the field notes approved by the Secretary of the Interior, on the — day of —, 19—; and that the company has in all

^a Here insert the description of the act of Congress under which the application is made when filed under some other act than that of 1891 and 1898.

^b Or "for public purposes," as the case may be, see paragraph 23.

things complied with the requirements of the act of Congress¹ (March 3, 1891, granting right of way for canals, ditches, and reservoirs through the public lands of the United States).

Attest:

[Seal of company.]

_____,
President of the _____ Company.

_____,
Secretary.

FORM 7.

[Under act February 15, 1901.]

STATE OF _____,
County of _____, ss:

_____, being duly sworn, says he is the chief engineer of (or the person employed by) the _____ company, under whose supervision the survey was made of the grounds selected by the company for structures for electrical purposes under the act of Congress approved February 15, 1901, said grounds being situated in the _____ quarter of the _____ quarter of section _____, township _____, range _____, _____ principal meridian; that the accompanying drawing correctly represents the locations of the said structures; and that in his belief the structures represented are actually and to their entire extent required for the necessary uses contemplated by the said act of February 15, 1901 (31 Stat., 790).

_____,
Chief Engineer.

Subscribed and sworn to before me this _____ day of _____, 190-.

[SEAL.]

_____,
Notary Public.

FORM 8.

[Under act of February 15, 1901.]

I, _____, do hereby certify that I am the president of the _____ company; that the survey of the structures represented on the accompanying drawing was made under authority and by direction of the company, and under the supervision of _____, its chief engineer (or the person employed in the premises), whose affidavit precedes this certificate; that the survey as represented on the accompanying drawing actually represents the structures required in the _____ quarter of the _____ quarter of section _____, of township _____, of range _____, _____ principal meridian, for electrical purposes, under the act of Congress, approved February 15, 1901; and that the company, by resolution of its board of directors, passed on the _____ day of _____, 190-, directed the proper officers to present the said drawing for the approval of the Secretary of the Interior, in order that the company may obtain the use of the grounds required for said structures, under the provisions of said act approved February 15, 1901 (31 Stat., 790).

_____,
President of the _____ Company.

[Seal of the company.]

Attest:

_____,
Secretary.

¹ Here insert the description of the act of Congress under which the application is made, when filed under some other act than that of 1891.

FORM 9.

Reservoir declaratory statement.

[Under act of Jan. 13, 1897 (29 Stat., 484).]

RES. D. S. }
No. —. }

LAND OFFICE AT —, —, 19—.

I, —, of —, do hereby certify that I am president of the — company, and on behalf of said company, and under its authority, do hereby apply for the reservation of land in — County, State of —, for the construction and use of a reservoir for furnishing water for live stock under the provisions of the act of January 13, 1897 (29 Stat., 484). The location of said reservoir and of the land necessary for its use, is as follows: — of section — in township —, of range — M., containing — acres.

I hereby certify that to the best of my knowledge and belief the said land is not occupied or otherwise claimed, is not mineral or otherwise reserved, and that the said reservoir is to be used in connection with the business of the applicant of

The land owned or claimed by the applicant within the vicinity of the said reservoir (within three miles) is as follows: —.

I further certify that no part of the land to be reserved under this application is or will be fenced; that the same shall be kept open to the free use of any person desiring to water animals of any kind; that the land will not be used for any purpose, except the watering of stock; and that the land is not, by reason of its proximity to other lands reserved for reservoirs, excluded from reservation by the regulations and rulings of the land department.

The water of said reservoir will cover an area of — acres, in — of section —, in township —, of range — of said lands; the capacity of the reservoir will be — gallons, and the dam will be — feet high. The source of the water for said reservoir is —.

and there are no streams or springs within two miles of the land to be reserved except as follows: —.

The applicant has filed no other declaratory statements under this act except as follows:

No. —, — land office, area to be reserved — acres.

No. —, — land office, area to be reserved — acres.

No. —, — land office, area to be reserved — acres.

No. —, — land office, area to be reserved — acres.

No. —, — land office, area to be reserved — acres.

No. —, — land office, area to be reserved — acres.

No. —, — land office, area to be reserved — acres.

No. —, — land office, area to be reserved — acres.

No. —, — land office, area to be reserved — acres.

No. —, — land office, area to be reserved — acres.

Total, — acres, of which Nos. — are located in said county.

And I further certify that it is the *bona fide* purpose and intention of this applicant to construct and complete said reservoir and maintain the same in accordance with the provisions of said act of Congress and such regulations as are or may be prescribed thereunder.

[Seal of company.]

Attest:

Secretary.

STATE OF _____,

County of _____, ss:

_____, being duly sworn, deposes and says that the statements herein made are true to the best of his knowledge and belief.

Sworn to and subscribed before me this _____ day of _____, in the year 19—.

[SEAL.]

Notary Public.

NOTE.—When the applicant is a corporation the form should be executed by its president, under its seal, and attested by its secretary. When the applicant is not a corporation or an association of individuals, strike out the words in italics.

LAND OFFICE at _____,
_____, 19—.

I, _____, register of the land office, do hereby certify that the foregoing application is for the reservation of lands subject thereto under the provisions of the act of January 13, 1897; that there is no prior valid adverse right to the same; and that the land is not, by reason of its proximity to other lands reserved for reservoirs, excluded from reservation by the regulations and rulings of the land department.

Fees, \$_____ paid.

Register.

The description of the business of the applicant should include "a full and minute statement of the extent to which he is engaged in breeding, grazing, driving, or transporting live stock, giving the number and kinds of such stock, the place where they are being bred or grazed, and whether within an inclosure or upon uninclosed lands, and also from where and to where they are being driven or transported." Circular June 23, 1899.

FORM 10.

STATE OF _____,

County of _____, ss:

_____, being duly sworn says that he is the person who was employed to make the survey of a reservoir covering an area of _____ acres, the initial point of the survey being _____ (here describe as required by paragraph 23); said reservoir having been constructed upon the _____ quarter of the _____ quarter of section _____, township _____, range _____, _____ principal meridian, as proposed by reservoir declaratory statement, No. _____, which was filed in the local land office at _____, under the provisions of the act of January 13, 1897 (29 Stat., 484); that the said survey was made on the _____ day of _____, 190—; that the dam and all necessary works have been constructed in a substantial manner; that the reservoir has a capacity of _____ gallons, and at the time of said survey contained _____ gallons of water.

Sworn and subscribed to before me this _____ day of _____, 190—.

[SEAL.]

Notary Public.

FORM 11.

I, _____, do certify that I am the president of the _____ company which filed (or that I am the person who filed) reservoir declaratory statement, No. _____, in the local land office at _____; that the reservoir proposed has been constructed upon the _____ quarter of the _____ quarter of section _____, township _____, range _____, _____

principal meridian, covering an area of ——— acres, the initial point of the survey being ——— (describe as in Form 10); that the dam and all necessary works have been constructed in a substantial manner in good faith in order that the reservoir may be used and maintained for the purposes, and in the manner prescribed by the said act of January 13, 1897 (29 Stat., 484), the provisions of which have been and will be complied with in all respects.

[Seal of company.]

Attest:

_____,
President of the Company.

_____,
Secretary.

FORM 12.

STATE OF _____,

County of _____, ss:

_____, being duly sworn deposes and says that he is the president of the _____ company which filed (or that he is the person who filed) reservoir declaratory statement, No. _____, in the local land office at _____; that the reservoir constructed in pursuance thereof, as heretofore certified, has been kept in repair; that water has been kept therein to the extent of not less than _____ gallons during the entire calendar year of 190—; that neither the reservoir nor any part of the land reserved for use in connection therewith is or has been fenced during said years, and that the said company has in all things complied with the provisions of the act of January 13, 1897 (29 Stat., 484).

_____,
President of _____ Company.

Sworn and subscribed to before me this _____ day of _____, 190—.

[SEAL.]

_____,
Notary Public.

REVISED RULES OF PRACTICE.

Approved July 15, 1901.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 26, 1901.

SIR: I have the honor to submit herewith for your consideration and approval, if found satisfactory, a revised draft of the rules of practice in cases before the district land offices, the General Land Office, and the Department of the Interior.

It will be observed upon examination that aside from the incorporation therein of the new rule 8½, and the recently amended rules 17, 44, and 91, this edition makes no change in any of the rules except that rule 42 has been so modified as to make it recite the provisions of the circular of April 18, 1899, which dispensed with the signing of the testimony by the witnesses under certain circumstances.

Very respectfully,

BINGER HERMANN,
Commissioner.

The SECRETARY OF THE INTERIOR.

DEPARTMENT OF THE INTERIOR,
Washington, July 15, 1901.

SIR: I have examined the revised draft of the rules of practice in cases before the district land offices, the General Land Office, and the Department of the Interior, submitted with your inclosure of June 26, 1901, and return the same herewith duly approved.

Very respectfully,

E. A. HITCHCOCK,
Secretary.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

DEPARTMENT OF THE INTERIOR,
Washington, July 15, 1901.

The following rules of practice for the government of proceedings in this Department and subordinate offices in land cases, together with regulations governing the recognition of agents, attorneys, and other persons to represent claimants, are hereby prescribed, to take effect this day, except rule 91.

None of said rules shall be construed to deprive the Secretary of the Interior of the exercise of the directory and supervisory powers conferred upon him by law.

Proceedings under former rules of practice will not be prejudiced by anything herein contained.

E. A. HITCHCOCK,
Secretary.

I.

PROCEEDINGS BEFORE REGISTERS AND RECEIVERS.

1.—Initiation of contests.

RULE 1.—Contests may be initiated by an adverse party or other person against a party to any entry, filing, or other claim under laws of Congress relating to the public lands, for any sufficient cause affecting the legality or validity of the claim.

RULE 2.—In every case of application for a hearing an affidavit must be filed by the contestant with the register and receiver, fully setting forth the facts which constitute the grounds of contest. When the contest is against the heirs of a deceased entryman, the affidavit shall state the names of all the heirs. If the heirs are nonresident or unknown, the affidavit shall set forth the fact and be corroborated with respect thereto by the affidavit of one or more persons.

RULE 3.—Where an entry has been allowed and remains of record the affidavit of the contestant must be accompanied by the affidavits of one or more witnesses in support of the allegations made.

2.—Hearings in contested cases.

RULE 4.—Registers and receivers may order hearings in all cases wherein entry has not been perfected and no certificate has been issued as a basis for patent.

RULE 5.—In case of an entry or location on which final certificate has been issued the hearing will be ordered only by direction of the Commissioner of the General Land Office.

RULE 6.—Applications for hearings under Rule 5 must be transmitted by the register and receiver, with special report and recommendation, to the Commissioner for his determination and instructions.

3.—Notice of contest.

RULE 7.—At least thirty days' notice shall be given of all hearings before the register and receiver unless by written consent an earlier day shall be agreed upon.

RULE 8.—The notice of contest and hearing must conform to the following requirements:

1. It must be written or printed.
2. It must be signed by the register and receiver, or by one of them.
3. It must state the time and place of hearing.
4. It must describe the land involved.
5. It must state the register and receiver's number of the entry and the land office where and the date when made, and the name of the party making the same.

6. It must give the name of the contestant and briefly state the grounds and purpose of the contest.

7. It may contain any other information pertinent to the contest.

HOW TRANSFEREES AND ENCUMBRANCERS MAY ENTITLE THEMSELVES
TO NOTICE OF CONTEST OR OTHER PROCEEDINGS.

RULE 8½.—Transferees and encumbrancers of land, the title to which is claimed or is in process of acquisition under any public-land law, shall, upon filing notice of the transfer or encumbrance in the district land office, become entitled to receive and be given the same notice of any contest or other proceeding thereafter had affecting such land which is required to be given the original claimant. Every such notice of a transfer or encumbrance must be forthwith noted upon the records of the district land office and be promptly reported to the General Land Office, where like notation thereof will be made.

4.—Service of notice.

RULE 9.—Personal service shall be made in all cases when possible if the party to be served is resident in the State or Territory in which the land is situated, and shall consist in the delivery of a copy of the notice to each person to be served. When the contest is against the heirs of a deceased entryman, the notice shall be served on each heir. If the heirs of the entryman are nonresident or unknown, notice may be served upon them by publication as hereinafter provided. If the person to be personally served is an infant under fourteen years of age or a person who has been legally adjudged of unsound mind, service of notice shall be made by delivering a copy of the notice to the statutory guardian or committee of such infant or person of unsound mind, if there be one; if there be none, then by delivering a copy of the notice to the person having the infant or person of unsound mind in charge.

RULE 10.—Personal service may be executed by any officer or person.

RULE 11.—Notice may be given by publication only when it is shown by affidavit presented on behalf of the contestant and by such other evidence as the register and receiver may require that due diligence has been used and that personal service can not be made. The affidavit must also state the present post-office address of the person intended to be served, if it is known to the affiant, and must show what effort has been made to obtain personal service.

RULE 12.—When it is found that the prescribed service can not be had, either personal or by publication, in time for the hearing provided for in the notice, the notice may be returned prior to the time fixed for the hearing, and a new notice issued fixing another time of hearing, for the proper service thereof, an affidavit being filed by the contestant showing due diligence and inability to serve the notice in time.

5.—Notice by publication.

RULE 13.—Notice by publication shall be made by advertising the notice at least once a week for four successive weeks in some newspaper published in the county wherein the land in contest lies; and if no newspaper be published in such county, then in the newspaper published in the county nearest to such land. The first insertion shall be at least thirty days prior to the day fixed for the hearing.

RULE 14.—Where notice is given by publication a copy thereof shall, at least thirty days before the date for the hearing, be mailed, by registered letter, to each person to be so notified at the last address, if any, given by him as shown by the record, and to him at his present address named in the affidavit for publication required by Rule 11, if such present address is stated in such affidavit and is different from his record address. If there be no such record address and if no present address is named in the affidavit for publication, then a copy of the notice shall be so mailed to him at the post-office nearest to the land. A copy of the notice shall also be posted in the register's office for a period of at least thirty days before the date for the hearing and still another copy thereof shall be posted in a conspicuous place upon the land for at least two weeks prior to the date set for the hearing. When notice of proceedings commenced by the Government against timber and stone entries is given by publication the posting of notices upon the land will not be required.

6.—Proof of service of notice.

RULE 15.—Proof of personal service shall be the written acknowledgment of the person served or the affidavit of the person who served the notice attached thereto, stating the time, place, and manner of service.

RULE 16.—When service is by publication, the proof of service shall be a copy of the advertisement, with the affidavit of the publisher or foreman attached thereto, showing that the same was successively inserted the requisite number of times, and the date thereof.

7.—Notice of proceedings.

RULE 17.—Notice of motions, proceedings, orders, and decisions shall be in writing, and may be served personally or by registered letter mailed to the last address, if any, given by or on behalf of the party to be notified, as shown by the record, and if there be no such record address, then to the post-office nearest to the land; and in all those contest cases where notice of contest is given by registered mail under Rule 14, and the return of the registry receipt shows such notice to have been received by the contestee, the address at which the notice was so received shall be considered as an address given by the contestee, within the meaning of this rule. (See Rule 8½.)

RULE 18.—Proof of service by mail shall be the affidavit of the person who mailed the notice, attached to the post-office receipt for the registered letter.

8.—Rehearings.

RULE 19.—Orders for rehearing must be brought to the notice of the parties in the same manner as in case of original proceedings.

9.—Continuances.

RULE 20.—A postponement of a hearing to a day to be fixed by the register and receiver may be allowed on the day of trial on account of the absence of material witnesses, when the party asking for the continuance makes an affidavit before the register and receiver showing—

1. That one or more of the witnesses in his behalf is absent without his procurement or consent;
2. The name and residence of each witness;
3. The facts to which they would testify if present;
4. The materiality of the evidence;
5. The exercise of proper diligence to procure the attendance of the absent witnesses; and
6. That affiant believes said witnesses can be had at the time to which it is sought to have the trial postponed.

Where hearings are ordered by the Commissioner of the General Land Office in cases to which the United States is a party, continuances will be granted in accordance with the usual practice in United States cases in the courts, without requiring an affidavit on the part of the Government.

RULE 21.—One continuance only shall be allowed to either party on account of absent witnesses, unless the party applying for a further continuance shall at the same time apply for an order to take the depositions of the alleged absent witnesses.

RULE 22.—No continuance shall be granted when the opposite party shall admit that the witnesses would, if present, testify to the statement set out in the application for continuance.

10.—Depositions on interrogatories.

RULE 23.—Testimony may be taken by deposition in the following cases:

1. Where the witness is unable, from age, infirmity, or sickness, or shall refuse, to attend the hearing at the local land office.
2. Where the witness resides more than fifty miles from the place of trial, computing distance by the usually traveled route.
3. Where the witness resides out of or is about to leave the State or Territory, or is absent therefrom.
4. Where from any cause it is apprehended that the witness may be unable or will refuse to attend, in which case the deposition will be

used only in event that the personal attendance of the witness can not be obtained.

RULE 24.—The party desiring to take a deposition under Rule 23 must comply with the following regulations:

1. He must make affidavit before the register or receiver, setting forth one or more of the above-named causes for taking such deposition, and that the witness is material.

2. He must file with the register and receiver the interrogatories to be propounded to the witness.

3. He must state the name and residence of the witness.

4. He must serve a copy of the interrogatories on the opposing party or his attorney.

RULE 25.—The opposing party will be allowed ten days in which to file cross-interrogatories.

RULE 26.—After the expiration of the ten days allowed for filing cross-interrogatories, a commission to take the deposition shall be issued by the register and receiver, which commission shall be accompanied by a copy of all the interrogatories filed.

RULE 27.—The register and receiver may designate any officer, authorized to administer oaths within the county or district where the witness resides, to take such deposition.

RULE 28.—It is the duty of the officer before whom the deposition is taken to cause the interrogatories appended to the commission to be written out and the answers thereto to be inserted immediately underneath the respective questions, and the whole, when completed, is to be read over to the witness, and must be by him subscribed and sworn to in the usual manner before the witness is discharged.

RULE 29.—The officer must attach his certificate to the deposition, stating that the same was subscribed and sworn to by the deponent at the time and place therein mentioned.

RULE 30.—The deposition and certificate, together with the commission and interrogatories, must then be sealed up, the title of the cause indorsed on the envelope, and the whole returned by mail or express to the register and receiver.

RULE 31.—Upon receipt of the package at the local land office, the date when the same is opened must be indorsed on the envelope and body of the deposition by the local land officers.

RULE 32.—If the officer designated to take the deposition has no official seal, a proper certificate of his official character, under seal, must accompany his return.

RULE 33.—The parties in any case may stipulate in writing to take depositions before any qualified officer, and in any manner.

RULE 34.—All stipulations by parties or counsel must be in writing, and be filed with the register and receiver.

11.—Oral testimony before officers other than registers and receivers.

RULE 35.—In the discretion of registers and receivers testimony may be taken near the land in controversy before a United States commissioner, or other officer authorized to administer oaths, at a time and place to be fixed by them and stated in the notice of hearing.

2. Officers taking testimony under the foregoing rule will be governed by the rules applicable to trials before registers and receivers. (See Rules 36 to 42, inclusive.)

3. Testimony so taken must be certified to, sealed up, and transmitted by mail or express to the register and receiver, and the receipt thereof at the local office noted on the papers, in the same manner as provided in case of depositions by Rules 29 to 32, inclusive.

4. On the day set for hearing at the local office the register and receiver will examine the testimony taken by the officer designated, and render a decision thereon in the same manner as if the testimony had been taken before themselves. (See Rules 50 to 53, inclusive.)

5. No charge for examining testimony in such cases will be made by the register and receiver.

6. Officers designated to take testimony under this rule will be allowed to charge such fees as are properly authorized by the tariff of fees existing in the local courts of their respective districts, to be taxed in the same or equivalent manner as costs are taxed by registers and receivers under Rules 54 to 58, inclusive.

7. When an officer designated to take testimony under this rule, or when an officer designated to take depositions under Rule 27, can not act on the day fixed for taking the testimony or deposition, the testimony or deposition, as the case may be, will be deemed properly taken before any other qualified officer, at the same place and time, who may be authorized by the officer originally designated, or by agreement of parties, to act in the place of the officer first named.

12.—Trials.

RULE 36.—Upon the trial of a cause, the register and receiver may in any case, and should in all cases when necessary, personally direct the examination of the witnesses, in order to draw from them all the facts within their knowledge requisite to a correct conclusion by the officers upon any point connected with the case.

RULE 37.—The register and receiver will be careful to reach, if possible, the exact condition and status of the land involved by any contest, and will ascertain all the facts having any bearing upon the rights of parties in interest.

RULE 38.—In preemption cases they will particularly ascertain the nature, extent, and value of alleged improvements; by whom made, and when; the true date of the settlement of persons claiming; the steps taken to mark and secure the claim, and the exact status of the land at that date as shown upon the records of their office.

RULE 39.—In like manner, under the homestead and other laws, the conditions affecting the inception of the alleged right, as well as the subsequent acts of the respective claimants, must be fully and specifically examined.

RULE 40.—Due opportunity will be allowed opposing claimants to confront and cross-examine the witnesses introduced by either party.

RULE 41.—No testimony will be excluded from the record by the register and receiver on the ground of any objection thereto; but when objection is made to testimony offered, the exceptions will be noted, and the testimony, with the exceptions, will come up with the case for the consideration of the Commissioner. Officers taking testimony will, however, summarily put a stop to obviously irrelevant questioning.

RULE 42.—Upon the day originally set for hearing, and upon any day to which the trial may be continued, the testimony of all the witnesses present shall be taken and reduced to writing. When testimony is taken in shorthand, the stenographer's notes must be written out and the written testimony then and there subscribed by the witness and attested by the officer before whom the same is taken, unless the parties shall by proper stipulation in writing, filed with the record, mutually agree to the contrary, in which event the transcribed stenographic notes shall in all cases be accompanied by a certificate of the officer or officers before whom the testimony was taken showing that the witnesses were each duly sworn before testifying, and also by the affidavit of the stenographer who took the testimony in shorthand that the purported transcription thereof is a true and correct statement of the testimony actually given by the witnesses after being duly sworn at the hearing.

13.—Appeals.

RULE 43.—Appeals from the final action or decisions of registers and receivers lie in every case to the Commissioner of the General Land Office. (Revised Statutes, sections 453, 2478.)

In cases dismissed for want of prosecution the register and receiver will by registered letter notify the parties in interest of the action taken, and that unless within thirty days a motion for reinstatement shall be made, the default of the plaintiff will be final, and that no appeal will be allowed; which notice shall be given as provided in circular of October 28, 1886 (5 L. D., 204).

If such motion for reinstatement be made within the time limited, the local officers shall take action thereon, and grant or deny it, as they deem proper. If granted, no appeal shall lie. If overruled, the plaintiff shall have the right of appeal, the time for which shall be thirty days, and run from the date of written notice to the plaintiff.

RULE 44.—After hearing in a contest case has been had and closed, the register and receiver will, in writing, notify the parties in interest of the conclusions to which they have arrived, and that thirty days are allowed for appeal from their decision to the Commissioner, the notice to be served personally or by registered letter, as provided in Rule 17. (See Rule 8½.)

RULE 45.—The appeal must be in writing or in print, and should set forth in brief and clear terms the specific points of exception to the ruling appealed from.

RULE 46.—Notice of appeal and copy of specification of errors shall be served on appellee within the time allowed for appeal, and appellee shall be allowed ten days for reply before transmittal of the record to the General Land Office.

RULE 47.—No appeal from the action or decisions of the register and receiver will be received at the General Land Office unless forwarded through the local officers.

RULE 48.—In case of a failure to appeal from the decision of the local officers, their decision will be considered final as to the facts in the case and will be disturbed by the Commissioner only as follows:

1. Where fraud or gross irregularity is suggested on the face of the papers.

2. Where the decision is contrary to existing laws or regulations.

3. In event of disagreeing decisions by the local officers.

4. Where it is not shown that the party against whom the decision was rendered was duly notified of the decision and of his right of appeal.

RULE 49.—In any of the foregoing cases the Commissioner will reverse or modify the decision of the local officers or remand the case, at his discretion.

RULE 50.—All documents once received by the local officers must be kept on file with the cases, and the date of filing must be noted thereon; and no papers will be allowed under any circumstances to be removed from the files or taken from the custody of the register and receiver, but access to the same, under proper rules, so as not to interfere with necessary public business, will be permitted to the parties in interest, or their attorneys, under the supervision of those officers.

14.—Reports and opinions.

RULE 51.—Upon the termination of a contest, the register and receiver will render a joint report and opinion in the case, making full and specific reference to the postings and annotations upon their records.

RULE 52.—The register and receiver will promptly forward their report, together with the testimony and all the papers in the case, to the Commissioner of the General Land Office, with a brief letter of transmittal, describing the case by its title, the nature of the contest, and the tract involved.

RULE 53.—The local officers will thereafter take no further action affecting the disposal of the land in contest until instructed by the Commissioner.

In all cases, however, where a contest has been brought against any entry or filing on the public lands, and trial has taken place, the entryman may, if he so desires, in accordance with the provisions of the law under which he claims and the rules of the Department, submit final proof and complete the same, with the exception of the payment of the purchase money or commissions, as the case may be; said final proof will be retained in the local land office, and should the entry finally be adjudged valid, said final proof, if satisfactory, will be accepted upon the payment of the purchase money or commissions,

and final certificate will issue, without any further action on the part of the entryman, except the furnishing of a nonalienation affidavit by the entryman, or, in case of his death, by his legal representatives.

In such cases the party making the proof, at the time of submitting the same, will be required to pay the fees for reducing the testimony to writing.

15.—Taxation of costs.

RULE 54.—Parties contesting preemption, homestead, or timber-culture entries and claiming preference rights of entry under the second section of the act of May 14, 1880 (21 Stat., 140), must pay the costs of contest.

RULE 55.—In other contested cases each party must pay the costs of taking testimony upon his own direct and cross-examination.

RULE 56.—The accumulation of excessive costs under Rule 54 will not be permitted; but when the officer taking testimony shall rule that a course of examination is irrelevant and checks the same, under Rule 41, he may, nevertheless, in his discretion, allow the same to proceed at the sole cost of the party making such examination. This rule will apply also to cross-examination in contests covered by the provisions of Rule 55.

RULE 57.—Where parties contesting preemption, homestead, or timber-culture entries establish their right of entry under the preemption or homestead laws of the land in contest by virtue of actual settlement and improvement, without reference to the act of May 14, 1880, the cost of contest will be adjudged under Rule 55.

RULE 58.—Registers and receivers will apportion the cost of contest in accordance with the foregoing rules, and may require the party liable thereto to give security in advance of trial, by deposit or otherwise, in a reasonable sum or sums, for payment of the cost of transcribing the testimony.

RULE 59.—The cost of contest chargeable by registers and receivers are the legal fees for reducing testimony to writing. No other contest fees or costs will be allowed to or charged by those officers directly or indirectly.

RULE 60.—Contestants must give their own notices and pay the expenses thereof.

RULE 61.—Upon the termination of a trial, any excess in the sum deposited as security for the costs of transcribing the testimony will be returned to the proper party.

RULE 62.—When hearings are ordered by the Commissioner or by the Secretary of the Interior, upon the discovery of reasons for suspension in the usual course of examination of entries, the preliminary costs will be provided from the contingent fund for the expenses of local land offices.

RULE 63.—The preliminary costs provided for by the preceding section will be collected by the register and receiver when the parties are brought before them in obedience to the order of hearing.

RULE 64.—The register and receiver will then require proper provision to be made for such further notification as may become necessary in the usual progress of the case to final decision.

RULE 65.—The register and receiver will append to their report in each case a statement of costs and the amount actually paid by each of the contestants, and also a statement of the amount deposited to secure the payment of the costs, how said sum was apportioned, and the amount returned, if any, and to whom.

16.—Appeals from decisions rejecting applications to enter public lands.

RULE 66.—For the purpose of enabling appeals to be taken from the rulings or action of the local officers relative to applications to file upon, enter, or locate the public lands the following rules will be observed:

1. The register and receiver will indorse upon every rejected application the date when presented and their reasons for rejecting it.
2. They will promptly advise the party in interest of their action and of his right of appeal to the Commissioner.
3. They will note upon their records a memorandum of the transaction.

RULE 67.—The party aggrieved will be allowed thirty days from receipt of notice in which to file his appeal in the local land office. Where the notice is sent by mail, five days additional will be allowed for the transmission of notice and five for the return of the appeal.

RULE 68.—The register and receiver will promptly forward the appeal to the General Land Office, together with a full report upon the case.

RULE 69.—This report should recite all the facts and the proceedings had, and must embrace the following particulars:

1. A statement of the application and rejection, with the reasons for the rejection.
2. A description of the tract involved and a statement of its status, as shown by the records of the local land office.
3. References to all entries, filings, annotations, memoranda, and correspondence shown by the record relating to said tract and to the proceedings had.

RULE 70.—Rules 43 to 48, inclusive, and Rule 93 are applicable to all appeals from decisions of registers and receivers.

II.

PROCEEDINGS BEFORE SURVEYORS-GENERAL.

RULE 71.—The proceedings in hearings and contests before surveyors-general shall, as to notices, depositions, and other matters, be governed as nearly as may be by the rules prescribed for proceedings before registers and receivers, unless otherwise provided by law.

III.

PROCEEDINGS BEFORE THE COMMISSIONER OF THE GENERAL LAND OFFICE AND SECRETARY OF THE INTERIOR.

1.—Examination and argument.

RULE 72.—When a contest has been closed before the local land officers and their report forwarded to the General Land Office, no additional evidence will be admitted in the case, unless offered under stipulation of the parties to the record, except where such evidence is presented as the basis of a motion for a new trial or in support of a mineral application or protest; but this rule will not prevent the Commissioner, in the exercise of his discretion, from ordering further investigation when necessary.

RULE 73.—After the Commissioner shall have received a record of testimony in a contested case, thirty days will be allowed to expire before any action thereon is taken, unless, in the judgment of the Commissioner, public policy or private necessity shall demand summary action, in which case he will proceed at his discretion, first notifying the attorneys of record of his proposed action.

RULE 74.—When a case is pending on appeal from the decision of the register and receiver or surveyor-general, and argument is not filed before the same is reached in its order for examination, the argument will be considered closed, and thereafter no further arguments or motions of any kind will be entertained except upon written stipulation duly filed or good cause shown to the Commissioner.

RULE 75.—If before decision by the Commissioner either party should desire to discuss a case orally, reasonable opportunity therefor will be given in the discretion of the Commissioner, but only at a time to be fixed by him upon notice to the opposing counsel, stating time and specific points upon which discussion is desired; and except as herein provided, no oral hearings or suggestions will be allowed.

2.—Rehearing and review.

RULE 76.—Motions for rehearing before registers and receivers, or for review or reconsideration of the decisions of the Commissioner or Secretary, will be allowed, in accordance with legal principles applicable to motions for new trials at law, after due notice to the opposing party.

RULE 77.—Motions for rehearing and review, except as provided in Rule 114, must be filed in the office wherein the decision to be affected by such rehearing or review was made or in the local land office, for transmittal to the General Land Office; and, except when based upon newly discovered evidence, must be filed within thirty days from notice of such decision.

RULE 78.—Motions for rehearing and review must be accompanied by an affidavit of the party, or his attorney, that the motion is made in good faith, and not for the purpose of delay.

RULE 79.—The time between the filing of a motion for rehearing or review and the notice of the decision upon such motion shall be excluded in computing the time allowed for appeal.

RULE 80.—No officer shall entertain a motion in a case after an appeal from his decision has been taken.

3.—Appeals from the Commissioner to the Secretary.

RULE 81.—No appeal shall be had from the action of the Commissioner of the General Land Office affirming the decision of the local officers in any case where the party or parties adversely affected thereby shall have failed, after due notice, to appeal from such decision of said local officers.

Subject to this provision, an appeal may be taken from the decision of the Commissioner of the General Land Office to the Secretary of the Interior upon any question relating to the disposal of the public lands and to private land claims, except in case of interlocutory orders and decisions and orders for hearing or other matter resting in the discretion of the Commissioner. Decisions and orders forming the above exception will be noted in the record, and will be considered by the Secretary on review in case an appeal upon the merits be finally allowed.

RULE 82.—When the Commissioner considers an appeal defective, he will notify the party of the defect, and if not amended within fifteen days from the date of the service of such notice the appeal may be dismissed by the Secretary of the Interior and the case closed.

RULE 83.—In proceedings before the Commissioner in which he shall formally decide that a party has no right of appeal to the Secretary, the party against whom such decision is rendered may apply to the Secretary for an order directing the Commissioner to certify said proceedings to the Secretary and to suspend further action until the Secretary shall pass upon the same.

RULE 84.—Applications to the Secretary under the preceding rule shall be made in writing, under oath, and shall fully and specifically set forth the grounds upon which the application is made.

RULE 85.—When the Commissioner shall formally decide against the right of an appeal, he shall suspend action on the case at issue for twenty days from service of notice of his decision, to enable the party against whom the decision is rendered to apply to the Secretary for an order, in accordance with Rules 83 and 84.

RULE 86.—Notice of an appeal from the Commissioner's decision must be filed in the General Land Office and served on the appellee or his counsel within sixty days from the date of the service of notice of such decision.

RULE 87.—When notice of the decision is given through the mails by the register and receiver or surveyor-general, five days additional will be allowed by those officers for the transmission of the letter and five days for the return of the appeal through the same channel before reporting to the General Land Office.

RULE 88.—Within the time allowed for giving notice of appeal the appellant shall also file in the General Land Office a specification of errors, which specification shall clearly and concisely designate the errors of which he complains.

RULE 89.—He may also, within the same time, file a written argument, with citation of authorities, in support of his appeal.

RULE 90.—A failure to file a specification of errors within the time required will be treated as a waiver of the right of appeal, and the case will be considered closed.

RULE 91.—The appellee may file a written argument in his behalf within thirty days from service of the argument of the appellant, where the latter files an argument within the time allotted by Rule 89; otherwise, within thirty days from the expiration of the time so allotted to appellant.

This rule (91) as thus amended will take effect September 1, 1901.

RULE 92.—The appellant shall be allowed thirty days from service of argument of appellee in which to file argument strictly in reply, and no other or further arguments or motions of any kind shall be filed without permission of the Commissioner or Secretary and notice to the opposite party.

RULE 93.—A copy of the notice of appeal, specification of errors, and all arguments of either party shall be served on the opposite party within the time allowed for filing the same.

RULE 94.—Such service shall be made personally or by registered letter.

RULE 95.—Proof of personal service shall be the written acknowledgment of the party served or the affidavit of the person making the service, attached to the papers served, and stating time, place, and manner of service.

RULE 96.—Proof of service by registered letter shall be the affidavit of the person mailing the letter, attached to a copy of the post-office receipt.

RULE 97.—Fifteen days, exclusive of the day of mailing, will be allowed for the transmission of notices and papers by mail, except in case of notice to resident attorneys, when one day will be allowed.

RULE 98.—Notice of interlocutory motions and proceedings before the Commissioner and Secretary shall be served personally or by registered letter, and service proved as provided in Rules 94 and 95.

RULE 99.—No motion affecting the merits of the case or the regular order of proceedings will be entertained except on due proof of service of notice.

RULE 100.—Ex parte cases and cases in which the adverse party does not appear will be governed by the foregoing rules as to notices of decisions, time for appeal, and filing of exceptions and arguments, as far as applicable. In such cases, however, the right to file additional

evidence at any stage of the proceedings to cure defects in the proof or record will be allowed.

RULE 101.—No person hereafter appearing as a party or attorney in any case shall be entitled to a notice of the proceedings who does not at the time of his appearance file in the office in which the case is pending a statement in writing, giving his name and post-office address and the name of the party whom he represents; nor shall any person who has heretofore appeared in a case be entitled to a notice unless within fifteen days after being requested to file such statement he shall comply with said requirement.

RULE 102.—No person not a party to the record shall intervene in a case without first disclosing on oath the nature of his interest.

RULE 103.—When the Commissioner makes an order or decision affecting the merits of a case or the regular order of proceedings therein, he will cause notice to be given to each party in interest whose address is known.

4.—Attorneys.

RULE 104.—In all cases, contested or ex parte, where the parties in interest are represented by attorneys, such attorneys will be recognized as fully controlling the cases of their respective clients.

RULE 105.—All notices will be served upon the attorneys of record.

RULE 106.—Notice to one attorney in a case shall constitute notice to all counsel appearing for the party represented by him, and notice to the attorney will be deemed notice to the party in interest.

RULE 107.—All attorneys practicing before the General Land Office and Department of the Interior must first file the oath of office prescribed by section 3478, United States Revised Statutes.

RULE 108.—In the examination of any case, whether contested or ex parte, the attorneys employed in said case, when in good standing in the Department, for the preparation of arguments, will be allowed full opportunity to consult the records of the case, the abstracts, field notes, and tract books, and the correspondence of the General Land Office or of the Department not deemed *privileged* and *confidential*; and whenever, in the judgment of the Commissioner, it would not jeopardize any public or official interest, may make verbal inquiries of chiefs of divisions at their respective desks in respect to the papers or status of said case; but such inquiries will not be made to said chiefs or other clerks of division except upon consent of the Commissioner, Assistant Commissioner, or chief clerk, and will be restricted to hours between 11 a. m. and 2 p. m.

RULE 109.—Any attorney detected in any abuse of the above privileges, or of gross misconduct, upon satisfactory proof thereof, after due notice and hearing, shall be prohibited from further practicing before the Department.

RULE 110.—Should either party desire to discuss a case orally before the Secretary, opportunity will be afforded at the discretion of the

Department, but only at a time specified by the Secretary or fixed by stipulation of the parties, with the consent of the Secretary, and in the absence of such stipulation or written notice to opposing counsel, with like consent, specifying the time when argument will be heard.

RULE 111.—The examination of cases on appeal to the Commissioner or Secretary will be facilitated by filing in printed form such arguments as it is desired to have considered.

5.—Decisions.

RULE 112.—Decisions of the Commissioner not appealed from within the period prescribed become final, and the case will be regularly closed.

RULE 113.—The decision of the Secretary, so far as respects the action of the Executive, is final.

RULE 114.—Motions for review or rehearing before the Secretary must be filed with the Commissioner of the General Land Office within thirty days after notice of the decision complained of, and will act as a supersedeas of the decision until otherwise directed by the Secretary.

Any such motion must state concisely and specifically the grounds for review or rehearing, one or both as the case may be, upon which it is based, and may be accompanied by an argument in support thereof.

Upon its receipt, the Commissioner of the General Land Office will forward the motion immediately to this Department, where it will be treated as "special." If the motion does not show proper grounds for review or rehearing, it will be denied and sent to the files of the General Land Office, whereupon the Commissioner will remove the suspension and proceed to execute the decision before rendered. But if, upon examination, proper grounds are shown, the motion will be entertained and the moving party notified, whereupon he will be allowed thirty days within which to serve the same, together with all argument in support thereof, on the opposite party, who will be allowed thirty days thereafter in which to file and serve an answer, but consideration of the motion will not be deferred for further argument.

RULE 115.—None of these rules shall be construed to deprive the Secretary of the Interior of either the directory or supervisory power conferred upon him by law.

REGULATIONS GOVERNING THE RECOGNITION OF AGENTS AND ATTORNEYS BEFORE DISTRICT LAND OFFICERS.

1. An attorney at law who desires to represent claimants or contestants before a district land office must file a certificate, under the seal of a United States, State, or Territorial court for the judicial district in which he resides or the local land office is situated, that he is an attorney in good standing.

2. Any person (not an attorney at law) who desires to appear as an agent for claimants or contestants before a district land office must file a certificate from a judge of a United States court, or of a State or Territorial court having common-law jurisdiction, except probate courts, in the county wherein he resides or the local office is situated, duly authenticated under the seal of the court, that such person is of good moral character and in good repute, possessed of the necessary qualifications to enable him to render clients valuable service, and otherwise competent to advise and assist them in the presentation of their claims or contests.

3. The oath of allegiance required by section 3478 of the United States Revised Statutes must also be filed by applicants. In case of a firm, the names of the individuals composing the firm must be given, and a certificate and oath as to each member of the firm will be required.

4. An applicant to practice under the above regulations must address a letter to the register and receiver, inclosing the certificate and oath above required, in which letter his full name and post-office address must be given. He must state whether or not he has ever been recognized as an attorney or agent before this Department or any bureau thereof, or any of the local land offices, and, if so, whether he has ever been suspended or disbarred from practice. He must also state whether he holds any office under the Government of the United States.

After an application to practice has been filed in due form, the register and receiver will recognize the applicant as an attorney or agent, as the case may be, unless they have good reason to believe that the person making the application is unfit to practice before their offices, or unless otherwise instructed by the Commissioner or Secretary.

Registers and receivers must keep a record of the names and residences of all attorneys and agents recognized as entitled to represent clients in their several offices.

Every attorney must, either at the time of entering his appearance for a claimant or contestant or within thirty days thereafter, file the written authority for such appearance, signed by said claimant or contestant, and setting forth his or her present residence, occupation, and post-office address. Upon a failure to file such written authority within the time limited, it is the duty of the register and receiver to no longer recognize him as attorney in the case.

An attorney in fact will be required to file a power of attorney of his principal, duly executed, specifying the power granted and stating the party's present residence, occupation, and post-office address.

When the appearance is for a person other than a claimant or contestant of record, the attorney or agent will be required to state the name of the person for whom he appears, his post-office address, the character and extent of his interest in the matter involved, and when and from what source it was acquired. Authorizations and powers signed or executed in blank will not be recognized.

If any attorney or agent shall knowingly commit any of the following acts, viz: Represent fictitious or fraudulent entrymen; prosecute collusive contests; speculate in relinquishments of entries; assist in procuring illegal or fraudulent entries or filings; represent himself as the attorney or agent of entrymen when he is only attorney or agent for a transferee or mortgagee; conceal the name or interest of his client; give pernicious advice to parties seeking to obtain title to public land; attempt to prevent a qualified person from settling upon, entering, or filing for a tract of public land properly subject to such entry or filing, or be otherwise guilty of dishonest or unprofessional conduct, or who, in connection with business pending in local land offices or in this Department, shall knowingly employ as subagent, clerk, or correspondent a person who has been guilty of any one of these acts, or who has been prohibited from practicing before the register and receiver or this Department, it will be sufficient reason for his disbarment from practice, and registers and receivers are authorized to refuse to further recognize any person as agent or attorney who shall be known to them or be proven before them to be guilty of improper and unprofessional conduct as above stated.

An attorney or agent who has been admitted to practice in any particular land district may be enrolled and authorized to practice in any other district upon filing with the register and receiver of such district a certificate of the register or receiver before whom he was admitted to practice that he is an attorney or agent in good standing.

Any unprofessional conduct on the part of an attorney or agent should be reported to the Commissioner at once, together with the action of the local land officers in the premises.

Appeals from the action of the register and receiver in refusing to admit to practice or in refusing to further recognize an agent or attorney will lie to the Commissioner and Secretary, as in other appealable cases. (Circular approved March 19, 1887, 5 L. D., 508.)

LAWS AND REGULATIONS GOVERNING THE RECOGNITION OF AGENTS, ATTORNEYS, AND OTHER PERSONS TO REPRESENT CLAIMANTS BEFORE THE DEPARTMENT OF THE INTERIOR AND THE BUREAUS THEREOF.

1.—Laws.

The following statutes relate to the recognition of attorneys and agents for claimants before this Department:

“That the Secretary of the Interior may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his Department, and may require of such persons, agents, or attorneys, before being recognized as representatives of claimants, that they shall show that they are of good moral character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their claims; and such Secretary may, after notice and opportunity for a hearing, suspend or exclude from further practice before his Department any such person, agent, or attorney shown to be incompetent, disreputable, or who refuses to comply with the said rules and regulations, or who shall with intent to defraud in any manner deceive, mislead, or threaten any claimant or prospective claimant by word, circular, letter, or by advertisement.” (Act, July 4, 1884, sec. 5; 23 Stats., 101.)

“Every officer of the United States, or person holding any place of trust or profit, or discharging any official function under, or in connection with, any Executive Department of the Government of the United States, or under the Senate or House of Representatives of the United States, who acts as an agent or attorney for prosecuting any claim against the United States, or in any manner, or by any means, otherwise than in discharge of his proper official duties, aids or assists in the prosecution or support of any such claim, or receives any gratuity, or any share of or interest in any claim from any claimant against the United States, with intent to aid or assist, or in consideration of having aided or assisted, in the prosecution of such claim, shall pay a fine of not more than five thousand dollars, or suffer imprisonment not more than one year, or both.” (Section 5498, Revised Statutes.)

"It shall not be lawful for any person appointed after the first day of June, one thousand eight hundred and seventy-two, as an officer, clerk, or employé in any of the departments, to act as counsel, attorney, or agent for prosecuting any claim against the United States which was pending in either of said departments while he was such officer, clerk, or employé, nor in any manner, nor by any means, to aid in the prosecution of any such claim, within two years next after he shall have ceased to be such officer, clerk, or employé." (Section 190, Revised Statutes.)

"Any person prosecuting claims, either as attorney or on his own account, before any of the departments or bureaus of the United States, shall be required to take the oath of allegiance, and to support the Constitution of the United States, as required of persons in the civil service." (Section 3478, Revised Statutes.)

"The oath provided for in the preceding section may be taken before any justice of the peace, notary public, or other person who is legally authorized to administer an oath in the State or district where the same may be administered." (Section 3479, Revised Statutes.)

The act of May 13, 1884, sec. 2, (23 Stats., 22), provides that the oath above required shall be that prescribed by section 1757, Revised Statutes, which is as follows:

I, A B, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

2.—Regulations.

1. Under the authority conferred on the Secretary of the Interior by the fifth section of the act of July 4, 1884, it is hereby prescribed that an attorney at law who desires to represent claimants before the Department or one of its bureaus shall file a certificate of the clerk of the United States, State, or Territorial court, duly authenticated under the seal of the court, that he is an attorney *in good standing*.

2. Any person (not an attorney at law) who desires to appear as agent for claimants before the Department or one of its bureaus must file a *certificate from a judge* of a United States, State, or Territorial court, *duly authenticated under the seal of the court*, that such person is of good moral character and in good repute, possessed of the necessary qualifications to enable him to render claimants valuable service, and otherwise competent to advise and assist them in the presentation of their claims.

3. The Secretary may demand additional proof of qualifications, and reserves the right to decline to recognize any attorney, agent, or other person applying to represent claimants under this rule.

4. The oath of allegiance required by section 3478 of the United States Revised Statutes must also be filed.

5. In the case of a firm, the names of the individuals composing the firm must be given, and a certificate and oath as to each member of the firm will be required.

6. Unless specially called for, the certificate above referred to will not be required of any attorney or agent heretofore recognized and now in good standing before the Department.

7. An applicant for admission to practice under the above regulations must address a letter to the Secretary of the Interior, inclosing the certificate and oath above required, in which letter his full name and post-office address must be given. He must state whether or not he has ever been recognized as attorney or agent before this Department or any bureau thereof, and, if so, whether he has ever been suspended or disbarred from practice. *He must also state whether he holds any office of trust or profit under the Government of the United States.*

8. No person who has been an officer, clerk, or employee of this Department within two years prior to his application to appear in any case pending herein shall be recognized or permitted to appear as an attorney or agent in any such case as shall have been pending in the Department at or before the date he left the service: *Provided*, This rule shall not apply to officers, clerks, or employees of the Patent Office, nor to cases therein.

9. Whenever an attorney or agent is charged with improper practices in connection with any matter before a bureau of this Department, the head of such bureau shall investigate the charge, giving the attorney or agent due notice, together with a statement of the charge against him, and allow him an opportunity to be heard in the premises. When the investigation shall have been concluded, all the papers shall be forwarded to the Department, with a statement of the facts and such recommendations as to disbarment from practice as the head of the bureau may deem proper, for the consideration of the Secretary of the Interior. During the investigation the attorney or agent will be recognized as such, unless for special reasons the Secretary shall order his suspension from practice.

10. If any attorney or agent in good standing before the Department shall knowingly employ as subagent or correspondent a person who has been prohibited from practice before the Department, it will be sufficient reason for the disbarment of the former from practice.

11. Upon the disbarment of an attorney or agent, notice thereof will be given to the heads of bureaus of this Department, and to the other Executive Departments; and thereafter, until otherwise ordered, such disbarred person will not be recognized as attorney or agent in any claim or other matter before this Department or any bureau thereof.

INDEX.

	Page.		Page.
Adverse Claim.		Certificate.	
<i>See Mining Claim.</i>		Where a person has complied with all the terms and conditions necessary to obtaining title, and the officers of the Government whose duty it was to act in the premises in the first instance have accepted his proof and issued final certificate of entry thereon, he acquires a vested interest in the land embraced in his entry, and becomes <i>prima facie</i> the equitable owner thereof and entitled to a patent; and anyone thereafter attacking the entry assumes the burden of establishing such illegality in the procurement or allowance thereof as would defeat the issuance of patent thereon	87
Affidavit.		Circulars and Instructions.	
Circular of March 26, 1902, under act of March 11, 1902, relative to officers before whom affidavits, proofs, and oaths may be made	274	<i>See Table of, page XVIII.</i>	
Instructions of April 12, 1902, relative to execution of affidavits, proofs, and oaths before deputy clerks	286	Citizenship.	
Alaskan Lands.		<i>See Homestead.</i>	
The limitation in the last proviso to section 1 of the act of May 14, 1898, relating to entries of public lands in the district of Alaska, "that no homestead shall exceed 80 acres in extent," applies to the acreage that may be included in a single homestead entry, and does not limit the number of entries that may be made by an assignee of several soldiers' additional rights under section 2306, Revised Statutes	441	Coal Land.	
Allotment.		The Northern Pacific Railway Company is not authorized to select coal lands in lieu of lands relinquished under section 3 of the act of March 2, 1899	29
<i>See Indian Lands; Oklahoma Land.</i>		Coal lands are mineral lands within the meaning, generally, of the laws relating to the public lands	29
Appeal.		Commutation.	
<i>See Practice.</i>		<i>See Homestead; Oklahoma Lands.</i>	
Application.		Confirmation.	
Circular of March 26, 1902, under the act of March 11, 1902, relative to officers before whom affidavits, proofs, and oaths may be made by applicants and entrymen under the homestead, preemption, timber-culture, desert-land, and timber and stone acts	274	An adverse report upon an entry, by a special agent of the Government, filed within two years from the date of the final receipt issued upon such entry, is a "protest against the validity of such entry" within the meaning of the proviso to section 7 of the act of March 3, 1891, and the land department is warranted in making an investigation of such entry before passing it to patent	368
Instructions of April 12, 1902, relative to execution of affidavits, proofs, and oaths before deputy clerks by applicants under the homestead, preemption, timber-culture, desert-land, and timber and stone acts	286	Contest.	
Approximation.		A contest charging a desert-land entryman with failure to make the requisite annual expenditure, thus putting in issue the truth of the yearly proof offered by the entryman, may be brought prior to the expiration of the time allowed for the submission of final proof	10
<i>See Reservation, subtitle Forest Lands.</i>			
Arid Land.			
Circular of September 9, 1902, under act of June 17, 1902, relative to entries on lands withdrawn for the construction of irrigation works for the reclamation of arid lands	420		
Canals and Ditches.			
<i>See Right of Way.</i>			

	Page.		Page
An affidavit of contest against a desert-land entry, in which it is alleged that the entryman "has failed to make yearly proof for the first year as required by law," states a sufficient cause of action.....	276	A desert-land entry made under the act of March 3, 1877, but not completed, by final proof, until after the passage of the amendatory act of March 3, 1891, is governed, so far as the price to be paid for the land entered is concerned, by the law in force at the time the entry was made.....	277
In case of a contest against a timber-culture entry on the ground of failure to plant the acreage required by law, the entryman may, prior to the trial, relinquish part of his entry and retain the remainder, if his compliance with law is such as to entitle him to patent for the unrelinquished tract.....	137	The affidavit of the assignee of a desert-land entry required by the regulations must be sworn to before one of the officers of the local land office, a United States commissioner, or a judge or clerk of a court of record in the county wherein the land in question is situated; and where such affidavit is executed before an officer other than those enumerated, the assignment will not be recognized.....	184
Where a woman makes an application for homestead entry as a deserted wife, and subsequently procures a divorce on the ground of desertion, and entry upon her application is afterward allowed, in a contest against such entry, on the ground of fraud and collusion, the Department is not bound by the finding of fact made by the court in the divorce proceeding, but may determine from the proof whether or not she was a deserted wife at the time of her application.....	382	An entry or selection of public lands which is not so far perfected as to confer an equitable title or vested right does not take the land included therein out of the operation of the mining laws; but, ordinarily, where an entry or selection of public lands is received and recognized by the local officers, it will, while pending, prevent the receipt or recognition of other applications for the same land until such entry or selection is disposed of.....	352
Contestant.		Fees.	
The preferred right of entry accorded a contestant is not a vested right until he has "contested, paid the land-office fees, and procured the cancellation" of the entry attacked.....	137	The practice respecting the commissions to be paid the register and receiver in the administration of the acts of March 2, 1889, and August 15, 1894, relating to the disposition of lands in the late Sioux Indian Reservation, in case of the commutation of an entry, adhered to.....	250
Section 2 of the act of May 14, 1880, giving a preference right of entry to a successful contestant, does not extend to contests against Indian allotments.....	343	Final Proof.	
Desert Land.		Circular of March 26, 1902, under act of March 11, 1902, relative to officers before whom affidavits, proofs, and oaths may be made.....	274
Regulations of January 15, 1902, concerning the selection of desert lands by certain States.....	228	Forest Lands.	
A sparse and stunted growth of trees which may exist with little moisture and is frequently found upon arid lands actually unfit, without irrigation, for ordinary agricultural purposes, should not be held as necessarily indicative of the nondesert character of the land, and hence excluding it from selection under the act of August 18, 1894.....	149	See <i>Reservation</i> .	
Deserted Wife.		Hawaii.	
See <i>Contest</i> .		In an exchange of public lands in Hawaii, under the Hawaiian laws, for lands of private ownership, the title should be taken to the Territory if the land thus acquired is for uses of local government, but if for other than local public uses the conveyance should be to the United States.....	238
Ditches and Canals.		The proviso in section 55 of the act of April 30, 1900, limiting the amount of real estate which any corporation operating in the Territory of Hawaii may acquire and hold therein to 1,000 acres, precludes an exchange of lands owned by any such corporation for a quantity of public lands in said Territory aggregating more than 1,000 acres.....	249
See <i>Right of Way</i> .		The authority conferred by section 169 of the civil laws of Hawaii upon the Territorial	
Entry.			
Circular of March 26, 1902, under act of March 11, 1902, relative to officers before whom affidavits, proofs, and oaths may be made by applicants and entrymen under the homestead, preemption, timber-culture, desert-land, and timber and stone acts.....	274		
Circular of November 28, 1902, relative to compactness of desert-land entries.....	441		

officers to lease, sell, or otherwise dispose of the public lands of said Territory includes authority to grant an easement upon, over, and across them for the purpose of constructing, maintaining, and operating all works necessary to supply water for irrigating lands, developing power, and for domestic purposes; and by sections 186 and 193 of said civil laws said officers are expressly authorized to grant a right to use earth, rock, and timber upon adjacent public lands for the purpose of constructing, maintaining, and repairing such improvements. The power to make such grants for the purposes named being conferred upon the officers of the Territory by the local laws, which Congress by express direction has continued in force, and the power in no way depending upon the action of the Department of the Interior, it is not necessary that an application for the exercise thereof should be approved by the Secretary 281

Homestead.

See *Oklahoma Lands*.

GENERALLY.

Circular of October 25, 1902, under act of June 17, 1902, relative to homestead entries on lands temporarily withdrawn for irrigation purposes 423

One owning 160 acres of land in his own right, and also holding the title to other land in trust for another without any beneficial interest in himself, is not for that reason disqualified to make entry under the general provisions of the homestead law.... 166

In determining priorities of claims in a controversy arising upon the filing by a railroad company of a list of selections regular in form upon the day the plat of survey of the township in which the selected lands are situated was officially filed, and the presentation, on the same day, of homestead applications for said lands, the actual time of the presentation of the claims will be recognized 151

An application to purchase under section 2 of the act of June 15, 1880, will not be allowed in the absence of an affidavit showing the nonmineral character of the land applied for and that no prosecution or proceeding has been had against the applicant on account of any trespass committed or material taken from any of the public lands subsequent to March 1, 1879 143

Where a homestead entryman who has declared his intention of becoming a citizen dies, after the submission of final proof, without having been admitted to citizenship, but having complied with the law in all other respects except as to the submission of proof within the statutory period, the entry may be equitably confirmed for

the benefit of the heirs who are citizens and patent issue in their names 403

The act of May 17, 1900, known as the free homestead act, operated to abrogate the general rule recognized in departmental practice, that requires payment to be made for the excess area embraced in homestead entries containing more than 160 acres, in so far as such rule, prior to the passage of said act, affected the entry of lands designated therein..... 162

The widow of an honorably discharged soldier, who made homestead entry in her own right as the head of a family, for less than one hundred and sixty acres of land, is, under section 2 of the act of June 8, 1872, as amended by the act of March 3, 1875, entitled to make an additional entry of so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres 349

A homestead entryman who failed to perfect title under his entry, and thereafter made a second entry under the act of March 2, 1889, which second entry was also not perfected, but "lost or forfeited," was by the act of June 5, 1900, restored to the status of a qualified homestead claimant and became entitled to the benefits of the homestead laws as though the second entry had not been made..... 25

A married woman is not disqualified to make additional entry under section 5 of the act of March 2, 1889, where prior to the passage of said act, and when possessing the necessary qualifications, she made her original entry and submitted final proof thereon showing due compliance with law. 129

COMMUTATION.

Circular of June 19, 1902, under act of May 22, 1902, with respect to commutation of and second homestead entries 358

In the commutation of homestead entries constructive residence from the date of the entry will be recognized where settlement is made and residence established within six months thereafter 159

All persons who have acquired title to a homestead by commutation, whether under the provision of section 2301 of the Revised Statutes or under any one of the special acts relating to Oklahoma lands, are, if otherwise qualified, entitled to enter a homestead of the Comanche, Kiowa, and Apache lands 46

SOLDIERS' ADDITIONAL.

A soldier's additional right of entry is not dependent upon consummation of the original entry 349

A soldier entitled to the benefits of section 2306 of the Revised Statutes does not by the making of an invalid adjoining farm entry, as additional to his original

	Page		Page
homestead entry, lose his right to an additional entry under said section.....	26	life and widowhood, or, in the event of her death without appropriating it, by the soldier's minor orphan children, during their minority, through a guardian duly appointed and officially accredited at the Department of the Interior; and in instances where it is not so appropriated, the estate of the soldier is not divested thereof.....	256
The qualifications of a soldier who makes application for an additional homestead under section 2306 of the Revised Statutes, must be determined under the limitations found in section 2304, which provides that the soldier shall have "served in the army of the United States during the recent rebellion, for ninety days".....	428	The regulation of the land department requiring assignment of soldiers' additional rights to be acknowledged, is a mere rule of evidence, and not a rule of law fixing what acts are essential to a valid assignment of such rights.....	112
The provisions in section 2305, R. S., with respect to soldiers "discharged on account of wounds received or disability incurred in the line of duty," were made solely with respect to the credit that should be allowed a soldier for his military service in computing the period of his residence under an original entry, and in no way can be invoked as bearing upon the qualifications of an applicant under section 2306, whose status in that respect must be determined under limitations found in section 2304....	165	Where a party sells his right to make soldiers' additional entry, and executes and delivers an absolute assignment therefor, he has no right, by reason of the default of the purchaser to pay the price agreed upon for such assignment, which he can enforce against an innocent purchaser who purchased the right upon the faith of such assignment.....	101
The filing of a soldier's declaratory statement is not the equivalent of an entry, within the meaning of section 2306 of the Revised Statutes, granting the right to make a soldier's additional homestead entry to persons "who may have <i>heretofore entered</i> under the homestead laws less than one hundred and sixty acres of land".....	356	A duplicate certificate of soldiers' additional right, regularly issued, which does not indicate that it is a duplicate, purchased in good faith before the right had been exhausted, and in the hands of a <i>bona fide</i> purchaser, unsatisfied, at the time of the passage of the act of August 18, 1894, was by that act validated and made a certified right, which could thereafter be lawfully transferred, irrespective of the transferee's knowledge that the soldier's additional right had, prior to his purchase of the duplicate, been exercised through the use of the original certificate.....	216
One entitled under section 2 of the act of March 2, 1889, to make a second homestead entry for 160 acres, does not, by an entry under said act for a less area, affect his right to make a soldier's additional homestead entry under section 2306, Revised Statutes, where the aggregate of both entries does not exceed such quantity.....	430	Where it appears that a party has been given a mere power to locate a soldier's certificate of right to make additional entry, uncoupled with any interest therein, it is unnecessary for the present holder of such certificate, upon applying to locate the same, to furnish the affidavit of such party showing whether or not he now has any interest in the certificate.....	105
Where part of a homestead entry is canceled for conflict with a prior railroad grant, and the entryman thereupon elects to relinquish his entire entry, with the privilege of making a new entry elsewhere, there is no basis for a soldier's additional right, no part of the entryman's homestead right having been exhausted.....	258	No good reason exists for requiring the personal presentation of an application to make soldiers' additional entry, by either the soldier or his assignee, and if the proofs submitted in support thereof establish the material facts necessary to the existence of the right in the applicant, and the character of the land sought to be entered, they are sufficient, even though executed before some officer authorized to administer oaths outside of the land district in which the land sought to be entered is situate. Proof as to the character of the land may be made by any credible person having the requisite personal knowledge of the premises.....	320
The widow of a soldier who made homestead entry in her own right, prior to the adoption of the Revised Statutes, for less than 160 acres of land, is, by virtue of the provisions of sections 2306 and 2307 of such statutes, entitled to an additional homestead right, and if she fails to exercise such right it becomes upon her death an asset of her estate, subject to distribution as other personal property.....	443	The limitation in the last proviso to section 1 of the act of May 14, 1898, relating to entries of public lands in the district of Alaska, "that no homestead shall exceed 80 acres in extent," applies to the acreage	
The wife of an insane soldier, who makes homestead entry, as the head of a family, for less than 160 acres of land, is not, upon the death of the soldier, entitled, as his widow, to a soldier's additional homestead right based upon such entry.....	19		
On the failure of a soldier to exercise his additional homestead right under section 2306, Revised Statutes, during his lifetime, it may, under section 2307 of such statutes, be appropriated by his widow, during her			

that may be included in a single homestead entry, and does not limit the number of entries that may be made by an assignee of several soldiers' additional rights under section 2306, Revised Statutes 441

Indemnity.

See *Railroad Grant; School Land.*

Indian Lands.

See *Mineral Land; Mining Claim.*

Instructions of July 21, 1902, relative to settlers on Navajo Reservation, under act of July 1, 1902 381

Circular of July 25, 1902, relative to lands in former Ute Reservation subject to homestead entry, under act of June 13, 1902 388

Circular of July 29, 1902, relative to sale of Umatilla Reservation lands (Oregon), under act of July 1, 1902 392

The guardianship and control of the United States over the Indians continues after their lands have been allotted to them in severalty and after they have become citizens of the United States, and the Government has full authority to use military force to eject intruders from the allotments of the Indians 439

Indian wives of Indians who have entered lands under the provisions of the homestead laws are not entitled to allotments under the fourth section of the act of February 8, 1887, whether the marriage took place prior or subsequent to the act of August 9, 1888 417

Instructions of September 6, 1901, concerning commissions on agricultural Chippewa lands commuted under the act of January 26, 1901 106

All moneys accruing from the disposal of agricultural Chippewa lands under the provisions of the acts of January 14, 1889, and January 26, 1901, either for excess acreage or on commuted entries, should be deposited to the credit of the Chippewa Indians. 72

The register and receiver are not entitled to commissions upon such moneys either payable therefrom or out of the public moneys of the United States; but under the third paragraph of section 2238 of the Revised Statutes they are entitled to the commissions therein specified upon the price of the land embraced in entries, as excess acreage, and land involved in commuted entries, the same to be paid by the entrymen 73

All Indians residing upon the White Earth Reservation are entitled to share in the proceeds of dead timber on that reservation disposed of under the act of June 7, 1897... 315

The township in the White Earth Reservation set apart for the special occupancy of the Pembina Indians is, so far as the act of June 7, 1897, is concerned, to be regarded as a separate reservation, and not a part of the White Earth, and the Indians residing

thereon are entitled to the proceeds of dead timber taken therefrom under said act 315

Under article 3 of the agreement with the Shoshone and Bannock Indians, and the act of June 6, 1900, ratifying and confirming said agreement, each member of a family of said Indians occupying and cultivating, under the sixth section of the treaty of July 3, 1868, any portion of the lands ceded by said act of June 6, 1900, is entitled to an allotment thereunder, restricted to the lands occupied at the date of agreement, not exceeding 320 acres for any one family. 146

The right of dissent accorded by section 5 of the act of February 18, 1888, from the statutory allowance to the tribe or nation provided for by said act on account of right of way granted, is limited to a dissent by the general council of either the nation or tribe named, and there is no authority for the acceptance of a dissent by the principal chief of such nation or tribe; nor is the Department of the Interior authorized to extend the time within which such dissent may be certified 192

The acts of June 5, 1872, and February 11, 1874, constitute the only authority for the disposal of lands in the fifteen townships in the Bitter Root Valley opened to settlement by the act of June 5, 1872, and said acts specifically provide for their disposal to actual settlers only; hence said lands are not subject to entry under the timber and stone act 243

The provisions in the act of March 2, 1889, limiting the disposal of lands within the ceded portion of the Great Sioux Indian Reservation to actual settlers under the provisions of the homestead law and the laws relating to town sites, does not reserve said lands from the operation of the act of January 13, 1897, authorizing the use of public lands for reservoir purposes 246

In view of the fact that the practice, in the administration of the acts of March 2, 1889, and August 15, 1894, relating to the disposition of lands in the late Sioux Indian reservations, respecting the commissions to be paid the register and receiver by the entryman, under the act of March 2, where he commutes his entry, and of requiring no commission on the commutation of an entry made under the act of August 15, is of long standing and has been uniformly adhered to, and that the administration of both these acts is now largely completed, no change in such practice will be made..... 250

Jurisdiction.

The jurisdiction of the Land Department over public lands does not cease until the legal title has passed from the Government 87

A change in the person holding the office of Secretary of the Interior does not defeat or prevent a review or reversal in any in-

stance where the Secretary making the ruling, or rendering the decision, if still holding the office, would be in duty bound to review or reverse his own act. 87

Land Department.

The acts of the heads of the several departments of the Government in relation to matters which appertain to their respective duties are, in legal effect, the acts of the Executive. 88

The Land Department has authority to make such rules and regulations, not inconsistent with law, as may be necessary or appropriate to secure the effective and convenient administration of any law which falls within its jurisdiction. 288

The action of the local land officers upon questions of law or fact respecting the disposal of the public lands does not conclude their superior officers or the Government. Such action is in all cases reviewable by the Commissioner of the General Land Office and by the Secretary of the Interior as the proper administration of the law or the demands of justice may require. 288

Lien Selection.

See *Reservation*, subtitle *Forest Lands; School Lands*.

Married Woman.

See *Homestead*.

Mineral Land.

See *Railroad Grant*.

Coal lands are mineral lands within the meaning, generally, of the laws relating to the public lands. 29

Lands containing deposits of ordinary brick clay are not mineral lands within the meaning of the mining laws, though more valuable for such deposits than for agricultural purposes. 108

Lands which have been allotted to Indians, or to which a homestead entryman has acquired fixed and vested rights by reason of his compliance with the homestead laws, are not subject to the mining laws or to mineral exploration and entry. 125

Lands not known to contain valuable mineral deposits at the time when, in the absence of such knowledge, the rights of an Indian allottee or of a homestead or town-site entryman become fixed and vested are not thereafter subject to exploration, location, or entry by other parties under the mining laws. 154

Rights once vested in an allottee, or in an entryman under the homestead or town-site laws, or in a town-lot purchaser, can not be affected by the subsequent exploration or location of the lands for minerals. 154

In order to except mineral land from the operation of a town-site or other entry made in pursuance of law, the land must be known, at the time of the entry, to contain

minerals of such character and value as to justify expenditures for the purpose of extracting them. 88

Conditions with respect to the character of land, as they exist at the date of entry, or at the time when all the necessary requirements have been complied with by the person seeking title, must determine whether the land is subject to sale or other disposition under the law upon which the application for patent is based, and no change in such conditions, subsequently occurring, can impair or in any manner affect the applicant's right to a patent, if in other respects established. 88

When an applicant for public lands under the nonmineral laws has complied with all the terms and conditions necessary to secure title to a particular tract of land, he acquires a vested interest therein, if it is then not known to contain mineral deposits and is otherwise of the condition and character subject to disposition under the law under which he seeks title, and thenceforth the mining laws have no application to the land, the applicant is regarded as the equitable owner, the Government holds the legal title in trust for him, and no subsequent discovery of mineral in the land, or other change in its condition or character, can impair or in any manner affect his right or title. 812

Directions given that in all nonmineral entries of lands in the States of Mississippi, Louisiana, Arkansas, and Florida the same nonmineral affidavit be required, before the entry is permitted to go of record, as is required in other States to which the mining laws are applicable. 135

Mining Claim.

See *Oklahoma Lands*.

GENERALLY.

Revised circular of rules and regulations, July 26, 1901. 438

An entry or selection of public lands which is not so far perfected as to confer an equitable title or vested right does not take the land included therein out of the operation of the mining laws. 352

There is no authority in the mining laws for the issue of two patents for the same mineral land, the patent to one claimant to embrace only the surface land and the patent to another to embrace only the veins or lodes beneath the surface; nor is it within the contemplation of said laws that vein or lode deposits may be claimed, located, and patented independently of the surface ground connected with and containing or overlying them. 21

From the time of the passage of the act of June 6, 1900, the body of lands which were to be allotted or opened to settlement thereunder were subjected to the mining laws, and to mineral exploration and entry, so

ar as the same should be found to contain valuable mineral deposits; but such lands were to be subject to the mining laws, or to mineral exploration and entry, only so long as they should remain free from any vested right of individual ownership. 125

Upon the allotment of said lands in severalty, or upon title thereto being earned by a homestead entryman by compliance with the homestead law, the lands allotted, or embraced in a homestead entry, cease to be subject to the mineral provision of said act. 125

Valuable mineral deposits which may be found upon land allotted in severalty to an Indian under the act of June 6, 1900, are not withheld from the allottee or reserved to the United States, and can not be acquired under the mining law; but such land may, with the approval of the Secretary of the Interior, be leased by the allottee under the general statute relating to the giving of mining leases by Indian allottees. 125

The provision of the act of June 6, 1900, whereby the mining laws were extended over the lands ceded to the United States by the Comanche, Kiowa, and Apache tribes of Indians in the Territory of Oklahoma, was not intended to operate as an exception to the settled principles applied by the Land Department in the administration of the public land laws generally. Controversies between mineral and agricultural or town site claimants, as to any of said ceded lands, are to be determined upon the same principles which apply to like controversies with respect to the public lands situated elsewhere. 154

No mining location of land within the county-seat town sites of Lawton, Ada, or Hobart, made after the special reservation of those town sites on June 24, 1901, under the act of March 3, 1901, is of any validity or effect whatever. 154

Congress having made no provision for a United States surveyor-general for the Territory of Oklahoma, and not having authorized the duties required to be performed by a United States surveyor or surveyor-general in the administration of the mining laws generally to be performed in said Territory by any other officer, it is the duty of the Commissioner of the General Land Office, in administering the mining laws as extended over the aforesaid ceded lands by the act of June 6, 1900, to perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying of mining claims located upon said lands, with the view of obtaining patents for such claims, and all similar duties in any manner respecting the conduct of proceedings to obtain such patents, and to enforce and carry into execution any and every part of the provisions of the mining laws with respect to said ceded lands, not otherwise specially provided for in the act extending said laws over said lands. 154

LOCATION.

In a controversy between conflicting claimants to the same land, arising upon protest by a mineral locator against an application to purchase under the act of June 3, 1878 (amended by the act of August 4, 1892), where it appears that the land, when surveyed, was returned as of little, if any, value for agricultural purposes and chiefly valuable for the timber thereon, and the final proof submitted in support of such application appears to be sufficient in form and substance, the burden of proof at a hearing upon such protest rests upon the protestant. 400

Where in such a case the evidence fails to show that the land in controversy contains valuable deposits of mineral, and it appears that the discovery on the strength of which the mineral location was made consisted of the digging of a prospect hole to the depth of ten feet, in which about two cents' worth of gold was found, and ample time and opportunity were afforded prior to the hearing to test the extent and value of the alleged mineral deposits, without any systematic or continuous prospecting or working of the claim having been done, it can not be held that such a location is a mining claim within the meaning of said act of June 3, 1878. 400

The case of *Michie v. Gothberg*, 30 L. D., 407, cited and distinguished. 400

APPLICATION.

An application for patent to a lode mining claim may embrace ground lying on opposite sides of an intersecting patented mill site, provided the lode or vein upon which the location is based has been discovered in both parts of the lode claim. 359

Where an application for patent to a mining claim is abandoned as to a tract of land included therein, or rights thereto obtained by earlier proceedings under the application have been waived by delay to duly prosecute the same to completion, the application should, as to such tract, be rejected. 59

A tract of land included in a pending application for patent to a mining claim can not properly be included in the subsequent application of another party. 59

Where an applicant, after the close of the period of publication of notice, delays making entry until beyond the end of the calendar year, his laches, in the presence of the alleged relocation of the claim, are fatal to the entry. 69

An application for mineral patents which includes ground embraced in a prior or pending application for patent should not be received as to the ground in conflict; but where such an application has been received, and proceedings had thereon, and an adverse claim has been filed and suit

	Page.		Page.
brought upon it in a court of competent jurisdiction, the application will not be rejected and the parties required to begin proceedings anew, but the adverse suit will be recognized as a stay of proceedings on the application for patent until the suit shall have been finally determined, after which the application will be adjudicated in accordance with that determination.....	140	Said section authorizes proceedings to be had against a delinquent coowner of a mining claim only by "the coowners who have performed the labor or made the improvements" required. A coowner who has not made the required expenditure is not within the terms of the statute and is not in a position to take advantage of its forfeiture provisions.....	178
SURVEY.		NOTICE.	
The Land Department is without the jurisdiction or authority to correct mistakes, after patent, in the survey of a mining claim, as long as the patent remains outstanding..	121	There can be no valid entry upon an application for patent to a mining claim until notice of the application shall have been lawfully given.....	415
The returns of the surveyor-general in surveys of mining claims made under the mining laws are conclusive as to the quantity of the lands embraced in such claims.....	64	An adjudication by the land department that the notice of application for patent to a mining claim is fatally defective is equivalent to a determination that an entry based upon such application is illegal and should be canceled. In such case the entry will be treated as though formally canceled as of the date the notice was finally adjudicated to be insufficient.....	415
A mining claim legally located may be surveyed according to the lines of the location as marked on the ground, even though the surveyed lines may in part or in whole fall upon lands patented prior to the survey. A patent issued upon such a survey should exclude all lands within the lines of the survey which are also included in the prior patent.....	121	Notice.	
Where the certificate of entry of a placer mining claim describes the land in terms of the general public survey and the surveys of the excluded mining claims, such description is sufficiently accurate therein, and said surveys, taken together, furnish the necessary data for the computation of the area of the land and for the preparation of an accurate description to be incorporated in the patent.....	64	See <i>Mining Claim; Practice.</i>	
DISCOVERY AND EXPENDITURE.		Occupancy.	
Questions as to the making of annual expenditure upon mining claims and as to relocations alleged to have been made by reason of failure to make such expenditure or to duly resume work, are not for determination by the Land Department, but by the courts.....	69	The unauthorized and illegal occupancy of public lands subject to homestead entry only constitutes no bar to such entry thereof by one who asserts a right by virtue of compliance with the law and regulations relating to the entry of such lands.....	88
Labor or improvements to be credited toward meeting the requirements of the statute as to expenditure on a mining claim must actually promote or directly tend to promote the extraction of mineral from the land, or forward or facilitate the development of the claim as a mine or mining claim, or be necessary for its care or the protection of the mining works thereon or pertaining thereto.....	37	Proof that land is uninhabited is not the equivalent of proof that it is vacant or unoccupied.....	220
Claimant's quartz mill, situated on one of his claims in another group, even if constructed by him for the express purpose of crushing ores from the claims embraced in this entry, could not be accepted as an improvement made for the benefit of those claims, or either of them, within the meaning and intent of the statute.....	37	Officer.	
Section 2324, R. S., is a statute of forfeiture and should be strictly construed.....	178	Circular of March 26, 1902, under the act of March 11, 1902, relative to officers before whom affidavits, proofs, and oaths may be made by applicants and entrymen under the homestead, preemption, timber-culture, desert-land, and timber and stone acts	274
		Where deputy clerks are duly empowered by Congressional, State, or Territorial laws to perform the duties of clerks of courts of record, all affidavits, proofs, and oaths of any kind whatsoever required to be made by applicants and entrymen under the homestead, preemption, timber-culture, desert-land, and timber and stone acts may be made before such deputies with like effect as though made before their principals.....	286
		Oklahoma Lands.	
		Proclamation opening Kiowa, Comanche, Apache, and Wichita ceded lands	1
		Circular of July 5, 1901, with respect to qualifications of homestead entrymen in Wichita and Kiowa, Comanche and Apache ceded lands	9

Regulations of August 5, 1901, concerning opening of Wichita and Kiowa, Comanche and Apache ceded lands. 62

Regulations of August 5, 1901, concerning opening of Wichita and Kiowa, Comanche and Apache ceded lands, amended 63, 67

Circular of September 16, 1901, relative to disposition of Wichita and Comanche, Kiowa and Apache lands after expiration of "sixty days' period" 107

The general provisions of the town-site laws control in the allowance of town-site entries upon the lands ceded by the Kiowa, Comanche, and Apache Indians; and the special provision, authorizing the commutation of homestead entries for town-site purposes, contained in the second proviso of section 22 of the act of May 2, 1890, is not applicable to entries made upon said lands. 144

The selection and entry of land adjacent to a town site, by a duly qualified and registered homestead applicant, is not in violation of the letter or spirit of the law under which the lands in the territory ceded by the Comanche, Kiowa, and Apache Indians were opened to settlement and entry 88

In making homestead entry of lands in the territory ceded by the Comanche, Kiowa, and Apache Indians, it is not necessary that the lands shall be taken in square form; but the general provision of the act of March 3, 1891, amending section 2289 of the Revised Statutes, which directs that land to be taken as a homestead shall "be located in a body in conformity to the legal subdivisions of the public lands," will control as to the form of entries of these lands. 83

All persons who have acquired title to a homestead by commutation, whether under the provision of section 2301 of the Revised Statutes or under any one of the special acts relating to Oklahoma lands, are, if otherwise qualified, entitled to enter a homestead of the Comanche, Kiowa, and Apache lands. 46

Commutation may be allowed of all homestead entries made under the act of June 6, 1900, without reference to whether the entryman had previously commuted an entry under section 2301 of the Revised Statutes 445

Judicial proceedings instituted to compel the Secretary of the Interior, by writ of mandamus, to allot certain lands to a member of the Comanche tribe of Indians, under the agreement ratified by the act of June 6, 1900, with said Indian tribe, the courts, so far as the matter has proceeded, having ruled against the petition for mandamus, will not prevent the commutation of a homestead entry for town-site purposes, under section 22 of the act of May 2, 1890, and the act of March 11, 1902, of the land involved 366

Under the provision in the act of June 6, 1900, that in case any section 13 or 33, re-

served by said act to the Territory and future State of Oklahoma for university and other purposes, was "lost to said Territory by reason of allotment under this act or otherwise," other lands equal to the loss might be located, said Territory is authorized to select lands in lieu of any such section 13 or 33 lost to said reservation by reason of its inclusion within a pasture reserve set aside by the Secretary of the Interior pursuant to article three of a treaty between the United States and the Comanche, Kiowa, and Apache Indians, concluded October 6, 1892. 362

The act of May 17, 1900, known as the free homestead act, operated to abrogate the general rule recognized in departmental practice, that requires payment to be made for the excess area embraced in homestead entries containing more than one hundred and sixty acres, in so far as such rule, prior to the passage of said act, affected the entry of lands designated therein. 162

In view of the provisions of section 13 of the act of March 2, 1889, and section 2 of the act of June 5, 1900, one who has made a cash entry of Cheyenne and Arapahoe Indian lands under the act of October 20, 1893, is entitled to make a second homestead entry of lands in the Cherokee strip. 49

Patent.

The right to a patent, once vested, is, for most purposes, equivalent to a patent issued, and when in fact issued the patent relates back to the time when the right to it became fixed 88

The statement in a patent as to acreage of the land conveyed must yield to the terms of description therein employed. 272

Where an act of Congress directs the Secretary of the Interior to transfer title to public land, without specifically providing by what means the transfer shall be made, patent therefor will be issued in the usual manner. 348

Possession.

The use of unclosed land for the pasturing of stock, and the exclusion of others therefrom by means of a keeper or herder, constitutes possession thereof 446

Practice.

See *Rules Cited and Construed*, page XXIII.
Revised rules of. 527

Appeals by different parties, and relating to separate and distinct tracts of land, should be transmitted to the Department separately 258

It is not essential that the interrogatories required by Rule 24 of Practice be filed with an application for continuance and order to take depositions, made under Rule 21; it is sufficient that the interrogatories be prepared with reasonable diligence 67

	Page.		Page
In all cases where sufficient service has been made on an adverse party, who fails to appear or to respond to said notice, the case shall be treated as an <i>ex parte</i> proceeding, and can thereafter be proceeded with without further notice to him.....	318	where after the passage of said act the land may have been included in a homestead entry that is subsequently canceled.....	132
An entry erroneously canceled without notice to a transferee, whose interest was made known to the officers of the land department, will be reinstated upon application of the transferee.....	51	In the enactment of the seventeenth section of the act of March 3, 1891, Congress had in contemplation the protection of individual possession, and the right of entry under said section can not be recognized where the possession is not of such character.....	323
A transferee or mortgagee claiming under an entry, if his interest or claim is known to the land department, is entitled to notice of any action by the Government affecting the entry, whether the fact of his interest is made known to the land officers by a statement under oath or in some other way.....	51	Where a small-holding claimant within the provisions of sections 16, 17, and 18 of the act of March 3, 1891, has filed his claim and made due proof thereof in conformity with said sections and the regulations issued thereunder, and is fully entitled to a patent therefor, at the date of the decree of the Court of Private Land Claims confirming a private land grant in conflict therewith, the lands embraced in such claim must be held to be disposed of or granted by the United States, within the meaning of the provisions of sections 8 and 14 of said act, and excepted from the operation and effect of the decree of confirmation.....	332
Private Claims.		No lands were granted by the third section of the act of March 3, 1819, which were claimed or recognized by the preceding sections of the act, and it is therefore necessary to identify the land claimed under the third section and to show that it does not conflict with any claim confirmed by the first or second section.....	344
Congress having confirmed and directed the survey of a private land grant, it is not within the province of the Land Department to question its integrity or validity....	202	The use of uninclosed land for the pasturing of stock, and the exclusion of others therefrom by means of a keeper or herder, constitutes possession thereof, within the meaning of section 7, act of July 23, 1866....	446
If there is doubt as to the translation of the original title papers relating to a confirmed private land grant, the Land Department must be guided by the translation which governed the action of the surveyor-general and of Congress in the proceedings leading up to the confirmation of the grant....	202	The word "improved" as used in said section contemplates the utilization of the lands applied for under said section for some recognized purpose of settled and civilized life, not necessarily by the erection thereon of buildings like houses and barns, especially where such structures are located on adjacent land and are adapted to use on the land applied for. Lands so used and occupied are within the intendment of the statute.....	446
Where conflicting private land grants have been confirmed by Congress, each without any reference to the other, it is the duty of the Land Department to follow the confirmations and survey and patent each grant, leaving to the judicial tribunals the determination of all matters of priority and superiority of right to the area in conflict....	202	The right of purchase under said section is not defeated by adverse settlement claims, acquired after the passage of said act, with full knowledge and notice of the right asserted by the grant claimant to the lands upon which settlement was so made....	446
Where the confirmatory act provides that the survey of a private land grant "shall conform to and be connected with the public surveys of the United States, * * * so far as the same can be done, consistently with landmarks and boundaries specified," in the grant, and, on account of the absence of public surveys in the vicinity of the land, it appears to be impracticable to make the survey conform to and be connected with the public surveys, the same will not be required.....	202	Proclamation.	
The cost of the survey of a private land claim shall be paid by the claimant, after the completion of the survey, but prior to the issuance of patent.....	202	A proclamation of the President is immediately operative and imports notice to all the world.....	252
Instructions of July 24, 1901, with respect to notice of application for certificates of location under third section of act of June 2, 1858.....	45	Public Lands.	
The right to locate surveyor-general's scrip on land subject to sale at private entry at \$1.25 per acre, conferred by the special act of June 2, 1858, is in no wise affected by the general provisions of the act of March 2, 1839, or the absence of a restoration notice,		So long as the title to public land remains in the Government, the Land Department, and the Secretary of the Interior as the	

	Page.
head of that Department, are authorized to try and determine the rights of claimants therefor; and this power of necessity carries with it the power and involves the duty of determining whether such title remains in the Government or has been granted away from it.....	139
An authoritative order by the proper executive department of the Government directing the withdrawal of public lands from disposition is, while in force, a bar to the appropriation of the land under the public-land laws.....	193
Withdrawals of public lands may be made for present public uses, or disposition in a special way, or in anticipation of future uses or disposal.....	193
Wherever, by act of Congress, provision is made for the disposal of portions of the public lands of a designated class and character, selection or entry thereof under such act can not lawfully be permitted until the lands sought to be acquired under said act are shown to be of the class and character subject to disposal thereunder. When the evidence to enable such determination to be made does not appear from the land-office records, it must be furnished by those who seek title under the act.....	288
Under proceedings in the Land Department to acquire title to public land, no rights in the land are to be regarded as having become vested in the party seeking title until he shall have performed all the conditions and fulfilled all the requirements necessary to establish his right to a patent.....	288
Railroad Grant.	
<i>See Railroad Lands; Right of Way.</i>	
GENERALLY.	
Circular of September 22, 1902, under acts of June 22, 1874, August 29, 1890, and July 1, 1902, relative to settlers on railroad and wagon-road grants.....	424
Directions given that all action affecting lands within the conflicting limits of the grant made by the act of July 2, 1864, to the Northern Pacific Railroad Company and the grant made to the same company by the joint resolution of May 31, 1870, be suspended until further directions in the matter.....	219
In determining priorities of claims in a controversy arising upon the filing by a railroad company of a list of selections, regular in form, upon the day the plat of survey of the township in which the selected lands are situated was officially filed and the presentation, on the same day, of homestead applications for said lands, the actual time of the presentation of the claims will be recognized.....	151

LANDS EXCEPTED.

An expired preemption filing, of record at the date of the attachment of rights under the grant to the Northern Pacific Railroad Company, does not except the land covered thereby from the operation of the grant....	254
A preemption filing accepted by the local officers and placed of record, which was subsisting at the date of the definite location of the line of the Union Pacific railway opposite the tract covered thereby, excepts said tract from the grant made by the act of July 1, 1862, to aid in the construction of said road, without regard to the qualification of the person making such filing.....	442
Lands included in the withdrawal upon the map of general route of the Lake Superior and Mississippi railroad at the date of the passage of the act making the grant to the Northern Pacific Railroad Company were not "public lands," and for that reason were excepted from the Northern Pacific grant.....	432
Lands within ten miles of the probable route of the Lake Superior and Mississippi railroad, included in the withdrawal on account of the grant to aid in the construction of said road at the date of the passage of the act making the grant to the Northern Pacific Railroad Company, were not "public lands," and for that reason were excepted from the Northern Pacific grant....	32
INDEMNITY.	
Selections of lands under the act of June 4, 1897, while of record and awaiting consideration, bar indemnity selection of the same lands under a railroad grant.....	151
In case of the erroneous patenting to a railroad company, as indemnity, of a tract of land for the selection of which no previous application had been made, the company will be afforded an opportunity to specify a basis therefor and the patent allowed to stand.....	272
Lands within the overlap of the grant made by the act of July 2, 1864, to the Northern Pacific Railroad Company, and the grant made to the same company by the joint resolution of May 31, 1870, are subject to indemnity selection by said company under the latter grant.....	151
Where a fractional section has been described differently under the original survey of April 27, 1869, and the Carpenter survey of April 6, 1894, and selection thereof is made by a railroad company, as indemnity, under the description given in the original survey, such selection should be considered as a selection of the tract as described under the later survey, and patent should issue accordingly.....	272
MINERAL LANDS.	
In the absence of further legislation, the land department is without authority to	

	Page.
patent to the Northern Pacific Railroad Company, or its successor in interest, any lands within the land districts named in the act of February 26, 1895, prior to the examination and classification of said lands as nonmineral, provided for in said act	395
The act of February 26, 1895, limited the classification of lands within the limits of the Northern Pacific land grant in the State of Idaho to the Coeur d'Alene land district, and where lands in said State outside of that district were classified as nonmineral by mineral land commissioners appointed under said act, and the classification approved, notice of the listing or selection of such lands will be required to be given, as to such of the lands as are within 6 miles of a mining claim, in the manner provided by the regulations of July 9, 1894, notwithstanding such classification and approval..	394
CONFLICTING GRANTS.	
A reservation on account of a prior grant will defeat a later grant, like that made in aid of the Northern Pacific railroad, without regard to whether the lands are needed in satisfaction of the prior grant.....	32
ACT OF JULY 1, 1898.	
The act of July 1, 1898, is limited to conflicting claims upon odd-numbered sections in either the granted or indemnity limits of the Northern Pacific land grant: hence conflicting claims to lands in an even-numbered section are not subject to adjustment under said act.....	161
Purchasers under section 5 of the act of March 3, 1887, of lands covered by an expired preemption filing at the date of the attachment of rights under the grant to the Northern Pacific Railroad Company, and for that reason erroneously held to have been excepted from the grant, are not claimants adverse to the railroad company, and hence their claims are not subject to adjustment under the provisions of the act of July 1, 1898.....	254
Railroad Lands.	
An applicant to purchase under the fifth section of the act of March 3, 1887, who, at the time of his purchase from the railroad company, had knowledge that there were conflicting claims to the lands and that the company's claim was being contested, is not necessarily chargeable with bad faith because of such knowledge.....	325
One who with knowledge of the exception of mineral lands from the grant to the Southern Pacific Railroad Company purchases from said company lands within the limits of its grant, known to be mineral at the date of such purchase, is not a purchaser in good faith within the meaning of section 5 of the act of March 3, 1887.....	325
If such lands were not known to be mineral at the time of their purchase, no subse-	
quent discovery or development of minerals thereon could affect the question of the good faith of the purchase	325
Purchasers under section 5 of the act of March 3, 1887, of lands covered by an expired preemption filing at the date of the attachment of rights under the grant to the Northern Pacific Railroad Company, and for that reason erroneously held to have been excepted from the grant, are not claimants adverse to the railroad company, and hence their claims are not subject to adjustment under the provisions of the act of July 1, 1898	254
An application to purchase under section 5 of the act of March 3, 1887, can not be entertained until it has been finally determined that the land sought to be purchased is in fact excepted from the railroad grant.	254
A person entitled to make purchase under the provisions of section 5 of the act of March 3, 1887, upon being advised of an adverse claim asserted to the land under the homestead law, should make prompt assertion of his right of purchase by filing his application in the district land office, and his failure to make timely assertion of claim under such circumstances will bar his right of purchase as against the adverse claimant in possession	433
Rehearing.	
See <i>Practice.</i>	
Relinquishment.	
An entryman may relinquish at pleasure any legal subdivision of his entry, if no transfer thereof has been made, and such relinquishment will take effect immediately upon its filing	137
Repayment.	
The filing of a preemption declaratory statement is not an entry within the meaning of the repayment act: hence repayment of the fees and commissions paid on such statement can not be allowed.....	122
The right of repayment will be recognized in case of a desert-land entry erroneously allowed for land on both sides of a meandered stream, which was of the class which should have been meandered, and which renders the tracts embraced within the entry noncontiguous, notwithstanding the entry was canceled for a different reason..	311
The right to repayment of the purchase money paid on a desert-land entry will be recognized where the entry as allowed is in form <i>prima facie</i> noncompact, and it does not appear from the record that it was as nearly in compact from "as the situation of the land and its relation to other lands will admit of," and was for that reason erroneously allowed and could not have been confirmed.....	354

	Page.
The indemnity withdrawal made March 22, 1867, on account of the grant of July 27, 1866, for the Southern Pacific Railroad Company, was in violation of law and without effect, and did not operate to reserve the lands covered thereby from entry; hence a homestead entry of lands while included in the withdrawal was not, for that reason, an entry erroneously allowed that could not be confirmed, and repayment of the fees and commissions paid by the entryman is not authorized	270
Section 2357, Revised Statutes, fixing the price of alternate even-numbered sections within railroad limits at \$2.50 per acre, was not modified or repealed by the desert-land act of 1877; hence an entry allowed under said act, prior to the passage of the amendatory act of 1891, at the rate of \$1.25 per acre, was erroneously allowed and could not be confirmed, on the payment of such price, and the entryman is therefore entitled to repayment.....	277

Reservation.

See *Right of Way; School Land.*

GENERALLY.

A question of executive reservation or appropriation of public lands is one of fact, rather than of mere form	88
An authoritative order by the proper executive department of the Government, directing the withdrawal of public lands from disposition, is, while in force, a bar to the appropriation of the land under the public land laws.....	193
Withdrawals of public lands may be made for present public uses, or disposition in a special way, or in anticipation of future uses or disposal.....	193

FOREST LANDS.

Generally.

Circular of May 12, 1902, under act of April 15, 1902, relative to <i>bona fide</i> settlers in forest reserves	331
Paragraph 13 of rules and regulations of April 4, 1900, amended	182
Paragraph 21 of rules and regulations of April 4, 1900, amended	173
The excepting clause of the proclamation establishing the Olympic forest reservation ceases to be operative in behalf of a settler who fails to make entry or filing for the lands settled upon within the time allowed by law.....	47
The excepting clause of the proclamation establishing the Sierra forest reservation ceases to be operative in behalf of a settler who fails to make entry or otherwise place of record his claim for the lands settled upon within the time allowed by law.....	80
The act of March 3, 1899, relating to lands in the Black Hills forest reservation, did not abrogate and annul that portion of	

	Page.
the Executive order creating said reservation which prescribed what lands are excepted from the operation of that order, but merely provided that entries might be made so as to include the improvements of settlers regardless of legal subdivisions of the land.....	57
Lands within said reservation which at the date of the Executive order creating the same were covered by a valid settlement for which filing was not made within three months after the filing of the township plat do not come within the exception mentioned in said Executive order, and are therefore not subject to entry under said act of March 3, 1899	57

Act of June 4, 1897.

Circular of July 7, 1902, relative to lieu selections.....	372
No rights become vested in a selector under the act of June 4, 1897, until there has been a concurrence of (1) a relinquishment to the United States of the base land with proof that the relinquishment carries full title, and (2) a selection of other land in lieu of that relinquished with proof that the land selected is at the time of such concurrence of the character and condition subject to selection.....	312
Public land suspended from disposition by direction of the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, is not subject to selection under the act of June 4, 1897.....	318
Lands in the State of California claimed under the swamp-land acts, which have never been properly identified as of the character intended to be granted to the State under those acts, and which have never been certified or patented to the State thereunder, are not the subject of relinquishment or exchange under the act of June 4, 1897	308
Lands claimed under the grant to the State of Oregon by the act of July 2, 1864, to aid in the construction of a military road, for which no patent has issued, nor any legal equivalent thereof, are not a sufficient basis for an exchange under the act of June 4, 1897	215
An applicant to make selection under the act of June 4, 1897, who has in other respects complied with the statute and existing regulations but has failed to furnish the requisite proof of the character and condition of the land selected, may subsequently perfect his selection by submitting proof that such land was at the time of the presentation of his selection, and still continues to be, of the character and condition subject to selection, the rights of the selector to be determined as of the date when the selection is thus completed.....	220
An application to correct or change a lieu selection under the act of June 4, 1897, should	

	Page.
be accompanied by evidence showing whether or not the selector has transferred, assigned, or encumbered the land first selected or contracted so to do, whether any conveyance or instrument affecting or attempting to affect the title to such land, or the selector's right under the selection, is shown upon the records in the county or other office where such records are usually kept under the laws of the State or Territory where the land is situate, and as to whether, since its selection, such land has undergone any change in character or value by the cutting or removal of timber or the removal of any mineral or other thing of value.....	213
The rule of approximation permitted in entries under the homestead and other public-land laws may properly be applied in case of an exchange of lands under the act of June 4, 1897.....	225
Selections of land under the act of June 4, 1897, while of record and awaiting consideration, bar indemnity selection of the same lands under a railroad grant.....	151
Where a person owning lands within the limits of a forest reservation executes a deed of relinquishment thereof to the United States under the act of June 4, 1897, and said lands are subsequently excluded from the reservation, while the deed remains in the control of the vendor and unrecorded, the vendor can acquire no rights under said act by then filing the deed for record or causing it to be recorded.....	252
The relinquishment of lands selected in lieu of lands within the limits of a forest reserve on the ground that the lands in the township wherein the selected lands are situated have been suspended from disposal pending an investigation to determine whether the same were mineral in character, will not be accepted where it appears that the investigation has been concluded and the lands found to be of the character and condition subject to such selection....	28
Where the owner of lands covered by a patent, acting under the act of June 4, 1897, executed a deed of relinquishment thereof to the United States and recorded the same in the proper county office conformably to existing departmental regulations, while the lands were within the limits of a forest reservation, he became entitled, within a reasonable time, to complete the transaction by the selection of public lands in lieu of those relinquished, notwithstanding the subsequent exclusion from the reservation and restoration to the public domain of the relinquished lands	175
Directions given for the preparation of appropriate regulations covering contingencies such as presented in this case.....	175
The word "vacant" in the act of June 4, 1897, as in part descriptive of land thereby made subject to selection in lieu of land situated in a public forest reservation and relinquished to the Government, is used in its primary or ordinary sense of <i>unoccupied</i> , and not in a special, restricted, or technical sense intended only to describe land "not taken or appropriated of record"	288
Wherever, by act of Congress, provision is made for the disposal of portions of the public lands of a designated class and character, selection or entry thereof under such act can not lawfully be permitted until the lands sought to be acquired under said act are shown to be of the class and character subject to disposal thereunder. When the evidence to enable such determination to be made does not appear from the land office records, it must be furnished by those who seek title under the act	288
Under proceedings in the land department to acquire title to public land, no rights in the land are to be regarded as having become vested in the party seeking title until he shall have performed all the conditions and fulfilled all the requirements necessary to establish his right to a patent.	288
Where a selection is not accompanied by a showing that the land selected is vacant, no vested rights are obtained by its presentation, and an affidavit subsequently filed to the effect that the land was vacant at the time of attempted selection can not be given a retroactive operation so as to perfect the selection as of the date of its filing.	312
A statement in the nonoccupancy affidavit accompanying a lieu selection made under the act of June 4, 1897, that the land selected is "unoccupied by anyone having color of title thereto," is not a proper showing respecting the condition of the land; if it is occupied at all, the affidavit should state fully all the facts relating thereto, so as to enable the land department to determine the character and effect of the occupancy..	318
Proof that land is uninhabited is not the equivalent of proof that it is vacant or unoccupied	220
No vested right is obtained under the act of June 4, 1897, until the selector has, among other things, perfected his selection by the submission of proof that the selected land is nonmineral and unoccupied; and until this condition precedent is complied with the land is subject to exploration under the mining laws, and if found to be mineral in character is no longer subject to selection, and no right can be secured by any subsequent attempt to perfect an incomplete selection under which no right vested prior to the development of the mineral quality of the land	220
An entry or selection of public lands which is not so far perfected as to confer an equitable title or vested right does not take the land included therein out of the operation of the mining laws; but, ordinarily, where an entry or selection of public lands	

is received and recognized by the local officers, it will, while pending, prevent the receipt or recognition of other applications for the same land until such entry or selection is disposed of 352

In a case where, before a selector complies with the terms and conditions necessary to secure a vested right under the act of June 4, 1897, it is shown by exploration and development that the selected tract is in fact mineral, and is claimed and occupied under a mining location, the selection must be rejected 312

The reason for the requirement in the instructions of March 6, 1900, that the non-mineral affidavit filed with an application to make lieu selection under the act of June 4, 1897, should state whether the land selected is within six miles of any mining claim, does not exist where publication has actually been had as required by the regulations of December 18, 1899 251

An application to make lieu selection under the act of June 4, 1897, should not be received during the pendency of a prior similar application for the same land; but where a second application was so received prior to October 1, 1900, and held, awaiting disposition of the prior application, until after that date, it will, upon the final rejection of such prior application, be treated as within the exception or saving clause of the act of June 6, 1900 185

The owner of lands within a forest reservation, who, acting under the act of June 4, 1897, executed and delivered to the United States a deed therefor, and prior to October 1, 1900, made application for specific tracts of unsurveyed land in lieu thereof, is excepted from the provision of the act of June 6, 1900, restricting lieu selections thereunder to surveyed land 184

The act of June 6, 1900, restricting lieu selections under the act of June 4, 1897, to surveyed lands, does not prevent the owner of lands within a forest reservation, who, acting under the act of June 4, 1897, executed and delivered to the United States a deed therefor, and, prior to October 1, 1900, made application for specific tracts of unsurveyed land in lieu thereof, but failed to file therewith, or prior to October 1, 1900, the required proofs showing the condition and character of the selected lands, from subsequently, if the condition and character of the lands then permit, perfecting his selection by supplying the requisite proofs, the right of the selector to be determined as of the date when the selection is thus completed 186

Act of March 2, 1899.

The Northern Pacific Railway Company is not authorized to select coal lands in lieu of lands relinquished under section three of the act of March 2, 1899 29

Page.

The even-numbered sections alternate to those granted in aid of the construction of the Northern Pacific Railroad are not "reserved" within the meaning of that term as employed in section 3 of the act of March 2, 1899 198

In order to successfully assert, as against an intervening railroad selection made under the act of March 2, 1899, a right or claim acquired by settlement upon unsurveyed land with a view to entry thereof under the homestead laws, the homestead applicant must show that he established an actual residence upon the land within a reasonable time after settlement and that such residence had been maintained to the date of the presentation of his homestead application 196

The fact that a tract of unsurveyed land included in a list of selections filed by the Northern Pacific Railway Company under the provisions of section 4 of the act of March 2, 1899, was properly described in said list according to the description thereof in the official survey subsequently approved, does not relieve the company from filing a second list, within three months after the plat of survey of the township in which the land is situated is filed in the local land office, describing such tract according to such survey, as required by said section; and failure to file such second list within the required time subjects the land to intervening claims 396

MILITARY.

The departmental order of June 13, 1899, did not contemplate the restoration of the lands in the Fort Hays abandoned military reservation to entry, but only to settlement; hence no legal claim attached by the tender of an application to enter said lands while such order remained in force or by an appeal from its rejection 114

Reservoir.

The provisions in the act of March 2, 1899, limiting the disposal of lands within the ceded portion of the Great Sioux Indian reservation to actual settlers under the provisions of the homestead law and the laws relating to townsites, does not reserve said lands from the operation of the act of January 13, 1897, authorizing the use of public lands for reservoir purposes 246

The approval of a map or plat of survey of a constructed reservoir, under the act of January 13, 1897, relates back as of the time of the filing thereof; and no further disposition should be made of the lands upon which such reservoir has been constructed, pending final action upon such map or plat, nor after the approval thereof 246

Residence.

The default of a homestead entryman in the matter of establishing residence is not

	Page.		Page.
cured, under the act of June 16, 1898, by his enlistment in the military or naval service of the Government in time of war.....	169	The approval of an application for a right of way and necessary ground upon public land, under the act of May 14, 1896, for the purpose of generating, manufacturing, or distributing electric power, does not amount to a reservation or appropriation of the land embraced in the application, so as to take it out of the operation of the public land laws; and the claimant under such approved application is in no position to object to the disposal of the lands by the Government.....	360
In the commutation of homestead entries constructive residence from the date of the entry will be recognized where settlement is made and residence established within six months thereafter	159		
Res Judicata.		STATION GROUNDS.	
A change in the person holding the office of Secretary of the Interior does not defeat or prevent a review or reversal in any instance where the Secretary making the ruling, or rendering the decision, if still holding the office, would be in duty bound to review or reverse his own act.....	87	The act of April 25, 1896, provides for the acquirement of additional grounds "at stations <i>now existing</i> or for the establishment of new stations or depots;" hence applications for additional grounds at stations not existing at the time of the passage of said act can not be allowed.....	124
Right of Way.		TOLL ROAD.	
RAILROAD.		A toll road is a highway within the meaning of section 2477 of the Revised Statutes..	405
Regulations of July 8, 1901, concerning telegraph and telephone lines, electrical plants, tramroads, etc.....	13	The reservation of a right of way claimed under section 2477 of the Revised Statutes, in a patent issued for lands traversed thereby, is not necessary to the protection of such right.....	405
In case of conflicting applications for right of way for a railroad through a canyon, pass, or defile under the act of March 3, 1875, the Department will approve the maps of location filed by each company, if regular, without regard to any question of priority, and leave to the courts, in the event it becomes necessary, any determination as to the rights of the companies under their respective applications.....	411	CANALS, DITCHES, AND RESERVOIRS.	
The approval of the Department of the Interior is necessary, under the provisions of the act of March 2, 1899, to the acquirement of a right of way by a proposed line of railroad over an Indian allotment, and to the privilege granted by the act of March 3, 1875, to use such a right in common with another company.....	119	Regulations of July 8, 1901, concerning canals, ditches, reservoirs, etc.....	13
A railroad company upon compliance with the provisions of the act of March 2, 1899, is authorized to acquire thereunder rights of way through lots or lands situate within the limits of any townsite in the Indian Territory, the national or tribal title to which has not been extinguished by full payment of the purchase money therefor and by the execution and delivery of deeds of conveyance thereof in accordance with an act of Congress authorizing such conveyance.....	39	Regulations of June 26, 1902, concerning canals, ditches, reservoirs, etc.....	503
The right of a railroad company to extend its line of road over and across a navigable stream within the Indian Territory by means of a bridge to be constructed over such stream for that purpose can only be secured by act of Congress granting such privilege; but this does not affect the authority of the Secretary of the Interior in approving maps of definite location for rights of way, under the act of March 2, 1899, for even though the stream be navigable, his approval of the maps is a condition to the right to approach the bridge from the Indian lands on either side of such stream..	39	The approval of a map of right of way for a canal, ditch, or reservoir, under the 19th section of the act of March 3, 1891, does not vest in the applicant the title to the land covered by such right, and the land may thereafter be disposed of by the Government subject to such right of way.....	364
		Saline Land.	
		See <i>School Land</i> .	
		Circular of February 13, 1901, under act of January 31, 1901.....	131
		Circular of November 14, 1901, requiring nonsaline affidavit in case of application to enter nonmineral land.....	131
		Circular relative to nonsaline affidavits to be required in applications to enter public lands under the homestead and other laws providing for the disposal of non-mineral lands in States and Territories excluded by statute from the operation of the general mining laws, approved, and directions given for the amendment of the regular nonmineral affidavit by inserting therein a nonsaline clause	130
		Until the passage of the act of January 31, 1901, the policy of the Government was to reserve saline lands from disposition under any of the public land laws, whether relating to the disposition of agricultural lands or relating to the location and purchase of mineral lands, excepting as provided by the act of January 12, 1877.....	389

School Land.

See *States and Territories.*

GENERALLY.

The local officers may properly give such information as is shown by the records of their office, as to whether a given school section has been returned as mineral or nonmineral, or whether any portion thereof is or is not included in a homestead or other entry, etc., but it is not competent or proper for them to undertake to state in a manner which may be erroneously accepted as a certification or authorized statement, that such section has or has not passed to the State. 212

The character of school sections in California, whether mineral or nonmineral, is not to be wholly determined by the surveyor-general's return, nor is such return considered as very high or persuasive evidence of the character of the lands when it is once drawn in question. 212

Until laws and regulations for the leasing of school lands in the Territory of Oklahoma are prescribed by the legislature thereof, the authority and duty of deciding all questions in relation thereto are, by the act of May 4, 1894, cast upon a board composed of the governor, secretary, and superintendent of public instruction of said Territory, and the assent of the Department is not necessary to give validity to any action that may be taken by said board in relation to the leasing of such lands. 269

The grant made by section 1 of the act of June 21, 1898, is a grant *in present*, and upon the approval of said act the absolute title in fee to all sections 16 and 36 in the Territory of New Mexico which were then identified by the public surveys became immediately vested in said Territory, in so far as such sections embraced lands not known to be otherwise than of the character subject to the grant. 389

Land in a surveyed section numbered 16 or 36 in the Territory of New Mexico known to be saline in character at the date of the act of June 21, 1898, did not pass to the Territory under the grant of said sections for the support of common schools made by section 1 of said act, but passed to the Territory under the grant of saline lands by section 3 thereof. Land in a surveyed section numbered 16 or 36 not known to be saline in character at the date of said act passed to the Territory under the grant made by section 1. 389

The act of March 20, 1901, of the legislative assembly of New Mexico, amending section 12 of the Territorial act of March 16, 1899, by striking out the paragraph thereof which provides that all lands to be leased under section 10 of the act of Congress of June 21, 1898, shall first be appraised, is not in terms or by necessary implication retroactive; hence leases executed under said section 10 while said section 12 as originally

enacted was in force can not be approved without proof of the appraisal of the lands covered thereby prior to their execution. . . . 188

The "lands that may be leased only," referred to in section 10 of the act of June 21, 1898, embrace sections 16 and 36, granted for the use of common schools, and the "lands to the extent of two townships in quantity" granted for university purposes. There is no authority in said act to sell any of these lands or the standing timber thereon. 188

INDEMNITY.

In school indemnity selections the lands in lieu of which indemnity is claimed should be described according to their legal subdivisions. 34

Where school lands in lieu of which indemnity is claimed on the ground of their saline character are not shown to have been lost to the State by reason of their known mineral or saline character at the time of survey, a hearing should be had to determine their known character at such time. . . . 34

The preference right of selection granted to certain States, including the State of Washington, by the act of March 3, 1893, includes the right to select indemnity for losses occurring to the grant made to said State in support of common schools. 386

The act of March 3, 1853, granting sections 16 and 36 in each township to the State of California for school purposes, and the act of February 28, 1891, granting indemnity for such sections where they are "mineral land, or are within any Indian, military, or other reservation, or are otherwise disposed of by the United States," are *in pari materia*, and should be construed as one act. 335

Where any sections 16 or 36 were swamp and overflowed and passed to the State under the grant made by the act of September 28, 1850, they are "disposed of by the United States" within the meaning of the act of February 28, 1891, and the State is entitled to indemnity therefor. 335

The assignment by a State, as a base for the selection of land as indemnity under its school grant, of a portion only of a smallest legal subdivision, where the whole of that legal subdivision has been lost to the State, will not be accepted by the Department. 438

Scrip.

By the location of Valentine scrip upon a legal subdivision of the public land of less area than that called for by the scrip, the locator does not waive or surrender his right to the excess or unused portion thereof. . . . 259

The right to locate surveyor-general's scrip on land subject to sale at private entry at \$1.25 per acre, conferred by the special act of June 2, 1858, is in no wise affected by the general provisions of the act

	Page.	Page.
of March 2, 1889, or the absence of a restoration notice, where after the passage of said act the land may have been included in a homestead entry that is subsequently canceled	132	
The necessity for the sale of a decedent's property, whether real or personal, in the State of Alabama, is a jurisdictional fact that must appear upon the face of the record; and an order of sale, by a probate court, founded upon an application which does not allege or show that any legal cause for the sale exists, is a nullity and affords no basis for favorable action in proceedings to secure the issuance of scrip under the act of June 2, 1858.....	344	
Selection.		
See <i>Railroad Grant; Reservation; School Land.</i>		
Settlement.		
In order to successfully assert, as against an intervening railroad selection made under the act of March 2, 1889, a right or claim acquired by settlement upon unsurveyed land with a view to entry thereof under the homestead laws, the homestead applicant must show that he established an actual residence upon the land within a reasonable time after settlement and that such residence had been maintained to the date of the presentation of his homestead application	196	
States and Territories.		
See <i>School Land.</i>		
Directions given that in all nonmineral entries of lands in the States of Mississippi, Louisiana, Arkansas, and Florida the same nonmineral affidavit be required, before the entry is permitted to go of record, as is required in other States to which the mining laws are applicable.....	135	
The act of July 1, 1898, conferred upon residents of the State of Idaho the same right to cut and remove timber from lands within the limits prescribed by said act in the State of Wyoming, whether reserved or unreserved, as was enjoyed by the residents of Wyoming under the acts of March 3, 1891, and June 4, 1897	412	
Under the provision in the act of June 6, 1900, that in case any section 13 or 33, reserved by said act to the Territory and future State of Oklahoma for university and other purposes, was "lost to said Territory by reason of allotment under this act or otherwise," other lands equal to the loss might be located, said Territory is authorized to select lands in lieu of any such section 13 or 33 lost to said reservation by reason of its inclusion within a pasture reserve set aside by the Secretary of the Interior pursuant to article 3 of a treaty between the United States and the Comanche, Kiowa, and Apache Indians concluded October 6, 1892.....	362	
In the absence of express provision in section 2488, R. S., giving to the surveyor-general final authority over surveys in California, the power of supervision and direction lodged in the Commissioner of the General Land Office and the Secretary of the Interior by sections 441, 453, and 2478, R. S., necessarily extends to surveys of public lands in that State in like manner as to other public land transactions. The Secretary is not bound to accept and recognize for any purpose a survey of the public lands in California or elsewhere where there is mistake or fraud in its execution or approval, even though the returns or notes accompanying it show a portion of the land embraced therein to be swamp and overflowed.....	303	
Under a stipulation in a lease by the Territory of New Mexico that the board of public lands of said Territory shall have the power to at any time try and determine the question whether the lease was procured through false and fraudulent representations, said board has authority, without the intervention of a court, to terminate the lease upon a satisfactory showing that it was so procured	341	
In the absence of further legislation, the officers named in section 8 of the act of June 21, 1898, making certain grants of lands to the Territory of New Mexico, will continue a commission for the selection of "all grants of land made in quantity or as indemnity" by said act, until its prescribed duty has been fully performed; but the appropriation made by section 11 of said act, "for the purpose of paying the expense of the selection and segregation" of the lands granted, including compensation to the commission, having been exhausted, the Department is precluded from making any further disbursement for compensation to or expenses incurred by the commission....	261	
Circular of August 1, 1898, with respect to the disbursement of the appropriation made by section 11 of said act, annulled and discontinued, and the rules and regulations of July 20, 1898, governing the selections of land in the Territory of New Mexico under said act of June 21, 1898, continued in force and effect.....	261	
Statutes.		
See <i>Acts of Congress and Revised Statutes cited and construed</i> , pages XIX and XXII.		
Survey.		
The general law governing the survey and subdivision of the public lands makes the same and the quantity of land as stated therein, when duly returned and approved, conclusive for the purpose of the disposal of the lands.....	64	
Section 2401 of the Revised Statutes as amended by the act of August 20, 1894, does not authorize the survey of fragmentary portions of a township, but authorizes only the survey of entire townships	77	

	Page.
A purchaser of alleged swamp and overflowed land from the State of California after survey but before legal title had passed to the State by certification under section 2488, R. S., takes it subject to the power of the Secretary of the Interior to reject the survey, if not a lawful one, and to require that a correct survey be made.....	303
Where a fractional section in California has been described differently under the original survey of April 27, 1869, and the Carpenter survey of April 6, 1894, and selection thereof is made by a railroad company, as indemnity, under the description given in the original survey, such selection should be considered as a selection of the tract as described under the later survey, and patent should issue accordingly.....	272
In the absence of express provision in section 2488, R. S., giving to the surveyor-general final authority over surveys in California, the power of supervision and direction lodged in the Commissioner of the General Land Office and the Secretary of the Interior by sections 441, 453, and 2478, R. S., necessarily extends to surveys of public lands in that State in like manner as to other public land transactions. The Secretary is not bound to accept and recognize for any purpose a survey of the public lands in California or elsewhere where there is mistake or fraud in its execution or approval, even though the returns or notes accompanying it show a portion of the land embraced therein to be swamp and overflowed.....	303
Swamp Land.	
In the absence of express provision in section 2488, R. S., giving to the surveyor-general final authority over surveys in California, the power of supervision and direction lodged in the Commissioner of the General Land Office and the Secretary of the Interior by sections 441, 453, and 2478, R. S., necessarily extends to surveys of public lands in that State in like manner as to other public land transactions. The Secretary is not bound to accept and recognize for any purpose a survey of the public lands in California or elsewhere where there is mistake or fraud in its execution or approval, even though the returns or notes accompanying it show a portion of the land embraced therein to be swamp and overflowed.....	303
A purchaser of alleged swamp and overflowed land from the State of California after survey but before legal title had passed to the State by certification under section 2488, R. S., takes it subject to the power of the Secretary of the Interior to reject the survey, if not a lawful one, and to require that a correct survey be made.....	303
Timber and Stone Act.	
Lands in the Bitter Root Valley opened to settlement by the act of June 5, 1872, are	

	Page.
not subject to entry under.....	243
Lands as to which any <i>bona fide</i> claim is asserted under any law of the United States other than the act of June 3, 1878, or upon which there is situated any mining claim, or which contain mining or other improvements, except for ditch or canal purposes, save such as were made by or belong to the applicant, are not subject to sale or purchase under said act.....	408
Old excavations or unoccupied cabins, situated on abandoned mineral locations, are not such "mining or other improvements" as will except the land upon which they are located from purchase as timber land under the act of June 3, 1878, as amended by the act of August 4, 1892.....	264
The word "timber" as used in section 1 of the act of June 3, 1878, includes such trees, regardless of their dimensions, as may be used in erecting buildings or irrigation works, constructing railroads, tramways, or canals, building fences or corrals, timbering mining shafts or tunnels, or which may be utilized in the manufacture of any useful article.....	264
In a controversy between conflicting claimants to the same land, arising upon protest by a mineral locator against an application to purchase under the act of June 3, 1878 (amended by the act of August 4, 1892), where it appears that the land, when surveyed, was returned as of little if any value for agricultural purposes and chiefly valuable for the timber thereon, and the final proof submitted in support of such application appears to be sufficient in form and substance, the burden of proof at a hearing upon such protest rests upon the protestant.....	400
Where in such a case the evidence fails to show that the land in controversy contains valuable deposits of mineral, and it appears that the discovery on the strength of which the mineral location was made consisted of the digging of a prospect hole to the depth of 10 feet, in which about 2 cents' worth of gold was found, and ample time and opportunity were afforded prior to the hearing to test the extent and value of the alleged mineral deposits, without any systematic or continuous prospecting or working of the claim having been done, it can not be held that such a location is a mining claim within the meaning of said act of June 3, 1878.....	400
Timber Cutting.	
The act of July 1, 1898, conferred upon residents of the State of Idaho the same right to cut and remove timber from lands within the limits prescribed by said act, in the State of Wyoming, whether reserved or unreserved, as was enjoyed by the residents of Wyoming under the acts of March 3, 1891, and June 4, 1897.....	412
Toll Road.	
See <i>Right of Way</i> .	

Wagon Road Grant.

Circular of September 22, 1902, under acts of June 22, 1874, August 29, 1890, and July 1, 1902, relative to settlers on railroad and wagon road grants 424

The provisions of the act of June 22, 1874, relating to the adjustment of railroad land grants, can not be applied in the adjustment of conflicting claims to lands within the limits of a wagon road grant..... 174

Warrant.

Circular of February 18, 1896 (27 L. D., 218), respecting location and assignment of military bounty land, reapproved and reprinted in pamphlet form, without change except the substitution of rule 11 as amended July 6, 1898 (27 L. D., 234)..... 277

Page.

The general provision in the act of August 30, 1890, limiting the amount of land to which title may be acquired by any one person, under the public land laws, to 320 acres has no application to the location of military bounty land warrants held by assignment under the special provisions of section 2414 of the Revised Statutes 399

The owners of bounty land warrants issued under the act of March 3, 1855, which provides for the location of such warrants upon any lands of the United States subject to private entry, have the same rights with reference to the location thereof as they would have had if the act of March 2, 1889, restricting the sale of public lands at private entry to the State of Missouri, had not been passed 222